Date: 20071204

Docket: A-409-05

Citation: 2007 FCA 381

CORAM: **LINDEN J.A.**
NADON J.A.
SHARLOW J.A.

BETWEEN:

KREMIKOVTZI TRADE also known as KREMIKOVSKI TRADE

Appellant

and

PHOENIX BULK CARRIERS LIMITED,
THE CARGO OF COAL loaded on the Ship "M/V SWIFT FORTUNE" and
THE OWNERS OF THE CARGO AND ALL OTHERS INTERESTED IN THE CARGO OF COAL loaded on the Ship "M/V SWIFT FORTUNE"

Respondents

Heard at Vancouver, British Columbia, on November 6, 2007.

Judgment delivered at Ottawa, Ontario, on December 4, 2007.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: LINDEN J.A.
SHARLOW, J.A.

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Respondents

REASONS FOR JUDGMENT

NADON J.A.

[1] On September 13, 2005, the respondent, Phoenix Bulk Carriers Limited ("Phoenix"), commenced an action in the Federal Court, Docket No. T-1558-05, against a number of defendants, namely, *the cargo of coal loaded on the ship "M/V SWIFT FORTUNE" and the owners of the cargo and all others interested in the cargo loaded on the ship "M/V SWIFT FORTUNE"*.

[2] On the same day, Phoenix filed an "Affidavit to Lead Warrant" pursuant to Rule 481(2) of the *Federal Courts Rules* and, as a result, a warrant for the arrest of a cargo of coal (the "cargo") loaded on board the vessel "M/V SWIFT FORTUNE" (the "ship" or the "vessel") at the port of Vancouver between September 3 and September 5, 2005 was issued. In the event, the cargo was arrested on September 13, 2005.

[3] On September 14, 2005, Kremikovtzi Trade ("Kremikovtzi"), purporting to be a charterer of the ship, filed a motion pursuant to Rule 221(1)*(a), (c)* and *(f)*, seeking an order setting aside both the warrant of arrest and the Statement of Claim. More particularly, Kremikovtzi took the position that the action *in rem* could not be sustained by reason of the fact that it was not the beneficial owner of the cargo both at the time that the cause of action arose and at the time that the action was commenced. Kremikovtzi also argued that both the Statement of Claim and the affidavit to lead warrant were deficient.

[4] On September 15, 2005, Rouleau J. dismissed Kremokovtzi's motion. His Order reads, in part, as follows:

> **UPON** motion dated September 14, 2005, on behalf of Kremikovtzi Trade also know as Kremikovski Trade, a charterer of "SWIFT FORTUNE", for an Order that:
>
> 1. the warrant of arrest issued in this action bearing court Docket No. T-1558-05 be set aside, the Statement of Claim issued by the Court be struck out as scandalous, frivolous and vexatious; and
> 2. costs of this motion.
>
> **THIS COURT ORDERS** that the application by Defendant Kremikovtzi Trade is hereby dismissed.

> **THIS COURT FURTHER ORDERS** that the Plaintiff has satisfied the Court that the Defendant Kremikovtzi Trade is, to say the least, the beneficial owner of the cargo of coal presently on board the Defendant owner's vessel the "M/V SWIFT FORTUNE".
>
> The Plaintiff is hereby allowed to amend his statement of claim, as well as the affidavit in support of the lead warrant, to meet the requirements of the *Federal Court Rules*.
>
> […]

[5] Before proceeding further, I should point out that on September 20, 2005, Kremikovtzi posted satisfactory bail and the cargo was released.

[6] Kremikovtzi appealed Rouleau J.'s Order to this Court. The appeal was allowed (2006 FCA 1) on the ground that the arrested cargo was not "the subject of the action" as that term is used in subsection 43(2) of the Federal Courts Act, R.S.C. 1985, c. F-7 (the "Act"). As a result, the warrant of arrest was set aside and the in rem Statement of Claim was struck. This Court did not deal with the other grounds upon which Kremikovtzi relied in support of its motion to strike.

[7] The Supreme Court of Canada reversed the decision of this Court on the interpretation of subsection 43(2) of the Act, and remitted the case to this Court to deal with the remaining issues: Phoenix Bulk Carriers Ltd. v. Kremikovtzi Trade, [2007] 1 S.C.R. 588.

[8] This Court has now heard argument on the remaining issues. In my view, for the reasons that follow, this appeal cannot succeed. [go to your paragraph 10]

[9] The issues are stated as follows at paragraphs 43 to 45 of Kremikovtzi's Memorandum of Fact and Law:

> **PART II – POINTS IN ISSUE**
>
> 43. The learned chamber Judge erred in determining that Kremikovtzi was the beneficial owner of the cargo and, in particular, was the beneficial owner at the time the cause of action arose and at the time of the commencement of the action as required under Section 43(3) of the *FCA*.
>
> 44. The learned chambers Judge erred in finding that the Statement of Claim, as it was at the time of the hearing, and Affidavit to Lead Warrant fulfilled the requirements of maritime law, the *FCA* and the Federal Court Rules and, in particular, Rule 481(2) with respect to the arrest of the cargo.
>
> 45. The learned chambers Judge erred in allowing unspecified amendments to the Statement of Claim after the arrest and upholding the arrest on that basis.

[10] Before turning to the issues, it will be useful to reproduce, in part, section 43 of the Act, which is at the heart of this appeal:

Jurisdiction *in personam*	Compétence en matière personnelle
43. (1) Subject to subsection (4), the jurisdiction conferred on the Federal Court by section 22 may in all cases be exercised *in personam*.	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.
Jurisdiction *in rem*	Compétence en matière réelle
(2) Subject to subsection (3), 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.	(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.
Exception	Exception
(3) Despite subsection (2), the jurisdiction conferred on the Federal Court by section 22 shall not be exercised in rem with respect to a	(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)

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**.

[…]

Arrest

(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.

[Emphasis added]

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.**

…

Saisie de navire

(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.

[Non souligné dans l'original]

[11] I begin with Kremikovtzi's submission that the affidavit to lead warrant is deficient and that, as a result, the warrant of arrest should be set aside.

THE AFFIDAVIT TO LEAD WARRANT

[12] The affidavit filed by Phoenix in support of its request for a warrant for the arrest of the cargo is that of Mr. Edward Coll, sworn September 13, 2005. It is a short affidavit and I therefore reproduce it in full:

> I, Mr. Edward Coll, President of Phoenix Bulk Carriers (US) Corp. carrying on business at 88 Valley Road, Middletown, Rhode Island, United States, 02842, having been duly sworn, do depose and say that:
>
> 1. I am the President of Phoenix Bulk Carriers (US) Corp. which acts as agent for Phoenix Bulk Carriers Ltd., having its place of business at 80 Broad Street, Monrovia, Liberia;

2. The nature of the Plaintiff's claim against the Defendant is for the sum of USD $388,403.63 representing the loss of profit on a contract of affreightment entered into between the Plaintiff and Kremikovtzi Trade also known as Kremikovski Trade ("Kremikovski") on its behalf and on behalf of the owners of *in rem* defendants on or about the 27th of July 2005, as well as interest and costs;

3. The Plaintiff and Kremikovski entered into a contract of affreightment ("COA") for the carriage of a cargo consisting of between 70,000 and 75,000 metric tons of coal ("Cargo") from Vancouver, Canada to Bourgas, Bulgaria and the Ship M/V FAR EASTERN MARINE was nominated to perform the carriage;

4. In breach of the COA, the Cargo was loaded on the ship M/V SWIFT FORTUNE AT THE Neptune Terminals in Vancouver between September 3 and September 5, 2005;

Rule 481(2)*(b)*

5. This claim arises out of an agreement relating to the use or hire of a ship by charter party and falls therefore under s. 22(2)*(i)* and s. 43(3) of the *Federal Court[s] Act*;

Rule 481(2)*(c)*

6. The Plaintiff's claim has not been satisfied.

Rule 481(2)*(d)*

7. The property to be arrested is the coal loaded on the ship M/V SWIFT FORTUNE at the Neptune Terminals in Vancouver between September 3rd and 5th, 2005.

[13] Mr. Coll's affidavit was filed pursuant to Rule 481(2), which requires that an "Affidavit to Lead Warrant" be filed by a party seeking a warrant for the arrest of property. Rule 481(2) reads as follows:

481. (2) A party seeking a warrant under subsection (1) shall file an affidavit, entitled "Affidavit to Lead Warrant", stating *(a)* the name, address and occupation of the party; *(b)* **the nature of the claim and the basis for invoking the *in rem***	**481.** (2) La partie qui veut obtenir un mandat de saisie de biens dépose un affidavit, intitulé « Affidavit portant demande de mandat », qui contient les renseignements suivants : *a)* ses nom, adresse et occupation; *b)* **la nature de sa réclamation et le fondement juridique allégué pour**

jurisdiction of the Court;	**justifier la compétence de la Cour d'entendre l'action réelle;**
(c) that the claim has not been satisfied;	*c)* la mention qu'on n'a pas fait droit à sa réclamation;
(d) the nature of the property to be arrested and, where the property is a ship, the name and nationality of the ship and the port to which it belongs; and	*d)* la nature des biens à saisir et, s'il s'agit d'un navire, le nom et la nationalité du navire ainsi que son port d'attache;
(e) where, pursuant to subsection 43(8) of the Act, the warrant is sought against a ship that is not the subject of the action, that the deponent has reasonable grounds to believe that the ship against which the warrant is sought is beneficially owned by the person who is the owner of the ship that is the subject of the action.	*e)* si le mandat est demandé en vertu du paragraphe 43(8) de la Loi à l'égard d'un navire autre que celui contre lequel l'action est intentée, la mention que l'auteur de l'affidavit a des motifs raisonnables de croire que le navire faisant l'objet de la demande de mandat appartient au véritable propriétaire du navire en cause dans l'action.
[Emphasis added]	[Non souligné dans l'original]

[14] The issue raised by the appellant is in respect of Rule 481(2)*(b)*. More particularly, the question raised by the appellant is whether Mr. Coll has set out in his affidavit "the basis for invoking the *in rem* jurisdiction of the Court". In that respect, Mr. Coll states, at paragraph 5 of his affidavit, that "this claim arises out of an agreement relating to the use or hire of a ship by charter party and falls therefore under s. 22(2)*(i)* and s. 43(3) of the *Federal Court[s] Act*".

[15] The appellant says that that assertion is not in compliance with Rule 481(2)*(b)* in that it does not disclose Phoenix's basis for invoking the Federal Court's *in rem* jurisdiction. According to Kremikovtzi, the Rule required Mr. Coll to assert that Kremikovtzi was the owner of the cargo or that, at the very least, Phoenix believed that to be the case, both at the time that the cause of action arose and at the time the action was commenced. Consequently, as the affidavit to lead warrant is not in compliance with Rule 481(2), the warrant of arrest should be set aside.

[16] Phoenix, not surprisingly, does not agree with the position taken by Kremikovtzi. It submits that it was sufficient for Mr. Coll to say, as he did in paragraph 5 of his affidavit, that the claim arose out of an agreement relating to the use or hire of a ship by charter party and that the basis for invoking the *in rem* jurisdiction was paragraph 22(2)*(i)* and subsection 43(3) of the Act. Phoenix further says that nothing in Rule 481(2)*(b)* required Mr. Coll to provide the name of the owner of the cargo which Phoenix sought to arrest, nor did the Rule require him to state that the owner of the cargo beneficially owned it at the time the action was commenced and at the time when the cause of action arose.

[17] In my view, the affidavit to lead warrant is not deficient. First, I am satisfied that Rule 481(2)*(b)* did not require Mr. Coll to say anything with respect to either the beneficial ownership of the cargo or the factual basis supporting the Court's *in rem* jurisdiction under subsection 43(3). It was sufficient, in my view, for Mr. Coll to set out the legal basis on which Phoenix relied on to invoke the Court's *in rem* jurisdiction, i.e. paragraph 22(2)*(i)* and subsection 43(3) of the Act. In this regard, I am comforted by the French version of Rule 481(2)*(b)* which uses the words "le **fondement juridique allégué** pour justifier la compétence de la Cour d'entendre l'action réelle". The French version makes clear, in my view, that what was required of Mr. Coll was for him to set out the legal basis on which Phoenix relied to invoke the Court's *in rem* jurisdiction. To this I would add that in referring to subsection 43(3) of the Act, Mr. Coll was, in my view, implicitly asserting that the circumstances of the case were such that Phoenix's claim could be made *in rem*.

[18] In support of its position, Phoenix referred us to the decision of the Federal Court in *Lorac Transport Ltd. v. "THE ATRA"*, [1985] 1 F.C. 459, where Mr. Justice McNair dismissed an argument similar to the one made herein by Kremikovtzi. Although at issue in that case was former Rule 1003(2), which did not require, as the present Rule does, the affidavit to lead warrant to disclose the "basis for invoking the *in rem* jurisdiction of the Court", I believe that the conclusion reached by Mr. Justice McNair is entirely apposite in the present matter. At page 466 of his Reasons, he wrote:

> Subrule 1003(2) sets out the requirements for an affidavit to lead warrant. The affidavit here must show (a) the name and address and occupation of the application for the warrant; (b) the nature of the claim; (c) that the claim has not been satisfied; and (d) the nature of the property to be arrested. There is nothing requiring disclosure of the beneficial ownership of the property to be arrested. Surely, if this were a necessary averment the subrule would have said so. …

[19] In concluding as he did, Mr. Justice McNair expressed the opinion that the jurisdictional argument, i.e. the requirement of subsection 43(3) of the Act that the property subject of the arrest be under the beneficial ownership of the person who was its beneficial owner both at the time of the action and at the time that the cause of action arose, was "aimed at the action and not the warrant of arrest exercised under its aegis" (see p. 465 of Justice McNair's Reasons). I agree entirely with Mr. Justice McNair's view of the matter.

[20] I am also comforted in my view by the fact that in the case of sister ship arrests under subsection 43(8) of the Act, Rule 481(2)*(e)* expressly requires the deponent of an affidavit to lead warrant to state that "the ship against which the warrant is sought is beneficially owned by the person who is the owner of the ship that is the subject of the action".

[21] Second, I am satisfied that, in any event, the facts underlying the legal basis for invoking the Court's *in rem* jurisdiction have been provided by Mr. Coll in his affidavit. In particular, I have in mind paragraphs 2 and 3 of his affidavit, where he states that Kremikovtzi, on its behalf and on behalf of the owners of the cargo, entered into a contract of affreightment with Phoenix wherein it agreed to load on Phoenix's ship, the "M/V FAR EASTERN MARINE", between 70,000 and 75,000 metric tons of coal at the port of Vancouver for carriage to Bourgas, Bulgaria. Mr. Coll also asserts that, in breach of contract, Kremikovtzi failed to load the cargo on the "M/V FAR EASTERN MARINE".

[22] Although Mr. Coll's affidavit could have been made in clearer terms, I nonetheless understand his assertions to be to the effect that Kremikovtzi, or those on whose behalf it was acting, were the owners of the cargo and that they breached the contract of carriage. Although Mr. Coll does not expressly say that Kremikovtzi was the beneficial owner, both at the time that the cause of action arose and at the time of the action, that conclusion is clearly implied by his assertions.

[23] I therefore conclude that Mr. Coll's affidavit to lead warrant, when read in its entirety, satisfies the requirements of Rule 481(2)*(b)*.

[24] I now turn to the issues pertaining to the Statement of Claim and the beneficial ownership of the cargo, leaving aside for the moment the issue concerning the amendments to the Statement of Claim allowed by the Judge.

[25] Kremikovtzi's motion is brought pursuant to Rule 221(1)*(a)*, *(c)* and *(f)*, which read as follows:

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.

[26] First, Kremikovtzi says that Phoenix's Statement of Claim does not disclose a valid cause of action in that it fails to allege the *in personam* liability of the owners of the *in rem* property. Second, Kremikovtzi says that the Statement of Claim is scandalous, frivolous or vexatious and an abuse of the process of the Court in that it was not the beneficial owner of the cargo at the time that the action was commenced and at the time that the cause of action arose. Consequently, since the requirements of subsection 43(3) of the Act are not met, the action *in rem* cannot possibly succeed and, as a result, it should be struck.

[27] I now turn to the question of whether the Statement of Claim discloses a cause of action.

THE STATEMENT OF CLAIM

[28] Kremikovtzi argues that it was crucial, in order to sustain the *in rem* proceedings, for Phoenix to assert in the Statement of Claim an *in personam* claim against the owners of the cargo.

[29] In support of this position, Kremikovtzi relies, *inter alia*, on the decision of Mr. Justice MacKay in *Cold Ocean Inc. v. Ship "Gornostaevka"* (1999), 168 F.T.R. 264. In allowing motions which sought orders to quash and set aside warrants to arrest two ships and the cargo onboard one of these ships, the learned Judge concluded that an action *in rem* could not be maintained where the Statement of Claim failed to disclose an *in personam* claim against the owners of the ships and the cargo. At paragraph 8 of his Reasons, the learned Judge explained his conclusion in the following terms:

> [8] The reason for these conclusions, in brief, are these:
>
> (a) **The plaintiff's claim in relation to the ships and the cargo in question are not against the owners of either the ships or the cargo.** The defendant G.M.K. is described as "the registered owner by demise" which does not describe the owner, and the plaintiff was aware that G.M.K. was not the owner of the vessels. There is no dispute about the owner; at all material times the two ships were owned by PPO Jugrybpoisk of Kerch, Ukraine.
>
> (b) **There is no claim *in personam* in the statement of claim against the owner of the ships, or against the owner of the cargo in issue, and without that there can be no claim *in rem*** (see *Mount Royal/Walsh Inc. v. Ship Jensen Star et al.*, [1990] 1 F.C. 199; 99 N.R. 42, at p. p. 216 (F.C.A.).
>
> (c) The style of cause, in pleading "the owners and all others interested in the ship …" accords with the form for a claim in rem under rule 477 (**Federal Court Rules**, 1998, SOR/98-106), but that does not, without a specific claim in the statement of claim against the owners of a defendant ship, constitute a claim in personam against the owners (The **"Jensen Star"**, supra, at p. 219).
>
> (d) **In circumstances where a statement of claim does not include a claim in personam against the owners of a ship, or of its cargo, the statement of claim does not set out the**

> **necessary basis for a claim either in personam against the owners of a ship or in rem against the ships or cargo, and any warrant of arrest or supporting affidavit based on the statement of claim shall be set aside, and the statement of claim shall be struck out as scandalous, frivolous and vexatious pursuant to rule 221(1)*(c)*.**
>
> [Emphasis added]

[30] I agree entirely with Mr. Justice MacKay's statement of the law. I would, however, complete his statement by referring to this Court's decision in *Mount Royal/Walsh Inc. v. Ship Jensen Star et al.*, [1990] 1 F.C. 199; 99 N.R. 42, at p. p. 216 (F.C.A.), to which MacKay J. refers in the above passage, where Marceau J.A. remarked that a claim *in rem* is, in reality, a claim against the owner of the *res* and that for the *in rem* action to succeed, there must be personal liability on the part of the owner. Marceau J.A. then went on to say that a judgment *in personam* was not, however, a requirement of a judgment *in rem* (see pp. 216-217 of Marceau J.A.'s Reasons).

[31] I should point out that this Court's decision in *Mount Royal/Walsh, supra*, was rendered following an appeal from the judgment of the Trial Division after trial. This is not the case in the present matter. The issue comes to us by reason of a preliminary motion to dismiss brought under Rule 221.

[32] The test applicable to such a motion was correctly stated by Thurlow A.C.J. (as he then was) in *Waterside Ocean Navigation Co. v. International Navigation Ltd.*, [1977] 2 F.C. 257 (T.D.) at page 259, where he said:

> The application for an order dismissing the claim against the ship is based on the applicant's submission that there is no cause of action against the ship. **It is said that, except where the plaintiff claims a maritime lien, the right to sue *in rem* is dependant on the personal liability of the shipowner to the plaintiff and that this is not such a case.** The

> dismissal of an action at this stage on such a ground, however, as I see it, can be justified only if
> (1) the statement of claim discloses no reasonable cause of action, or
> (2) the claim is so forlorn that the action is an abuse of the process of the Court and should not be permitted to proceed.
>
> With respect to (1), the determination must be made on the basis of the allegations of the statement of claim. For the purpose of (2), whether the application is made under Rule 419(1)(c) or (f) [now Rule 221(1)*(c)* and *(f)*] or under the inherent jurisdiction of the Court, evidence is admissible. In neither case, however, is the onus on the applicant an easy one to discharge. The Court is always slow to strike out a statement of claim and dismiss an action under Rule 419(1)(a) [now Rule 221(1)*(a)*] and will do so only when it is clear that by no proper amendment can the statement of claim be revised so as to disclose a reasonable cause of action. The test is just as stringent, if not more so, when dismissal is sought on the ground that the proceeding is frivolous or vexatious or an abuse of the process of the Court. **The Court will not stop a proceeding and deny a plaintiff the right to have a case heard unless it is clear that the action is frivolous or vexatious or that the plaintiff has no reasonable cause of action and that to permit the action to proceed is an abuse of its process.**
>
> [Emphasis added]

[33] With respect to jurisdictional issues such as the one arising herein in respect of subsection 43(3) of the Act, the relevant test is not dissimilar to the one stated by Thurlow A.C.J. in *Waterside Ocean Navigation, supra*. In *Hodgson et al v. Ermineskin Indian Band et al* (2001), 267 N.R. 143, Rothstein J.A. (as he then was), writing for a unanimous panel of this Court, made the following remarks:

> 3 The basis of the Ermineskin Defendant's motion to strike is that the Federal Court lacks jurisdiction over a claim for damages or equitable relief against them and that they have no fiduciary duty towards non-members.
>
> 4 Counsel for the Ermineskin Defendants concedes that on a motion to strike under Rule 221(1)(a) the case must be plain and obvious and beyond doubt. The action was brought in 1991. The absence of jurisdiction in this Court in respect of the Ermineskin Defendants does not appear to have been plain and obvious to counsel for these Defendants for some years as the motion to strike was only first brought in 1998. Nor was it plain and obvious to Hargrave, P. or Reed, J. as they both dismissed the motion to strike.

> 5 While we are by no means confident that this Court has jurisdiction over the Plaintiffs' claims against the Ermineskin Defendants under section 17 of the Federal Court Act, **we are not prepared to say that the Court's lack of jurisdiction is plain and obvious and beyond doubt.** This is a case involving claims against an Indian band and band council as well as the Crown. While the Court clearly has jurisdiction in respect of judicial reviews of decisions of Indian band councils, jurisdiction in the case of actions against bands is far less clear. Insofar as the breach of fiduciary duty claim is concerned, the Band's argument that it has no fiduciary duty to non-members, while seemingly obvious at first blush, rests upon the Plaintiffs never having been members or being entitled to membership. It is not plain and obvious that, if the Plaintiffs or their ancestors were wrongly deleted or not added as members, there may not be some fiduciary duty owed to them.
>
> 6 **Counsel for the Ermineskin Defendants has not persuaded us that the validity of her motion is plain and obvious. We think it is prudent to allow this long outstanding matter to go to trial as soon as possible,** without further interlocutory proceedings, at which time, based upon all the facts adduced in evidence and full argument made before the Trial Judge, the jurisdiction and fiduciary duty questions can best be decided in the first instance.
>
> [Emphasis added]

[34] I now turn to Phoenix's Statement of Claim. Of relevance to the issue before us are paragraphs 3 through 9, which I hereby reproduce:

> 3) On or about the 27th of July, 2005, Phoenix entered into a contract of affreightment (the "COA") with Kremikovtzi Trade also know as Kremikovski acting on its own behalf and on behalf of the prospective owners of the cargo of between 70,000 to 75,000 metric tonnes of coal to be carried from Vancouver, Canada to Bourgas, Bulgaria (the "Cargo");
>
> 4) On the 31st of July, 2005, pursuant to its obligations under the COA, Phoenix nominated the ship M/V FAR EASTERN MARINA to carry out the voyage from Vancouver to Bourgas as per the terms of the COA;
>
> 5) Rather than complying with its obligations under the COA, the prospective owners of the Cargo, either directly or through Kremikovtzi Trade also know as Kremikovski Trade, proceeded with fixing another vessel to perform the voyage with respect to the Cargo that was originally contemplated under the COA;

> 6) In fact, the prospective owners of the Cargo fixed the Cargo with the owners or managers of the ship M/V SWIFT FORTUNE for loading at Vancouver and carriage to Bourgas;
>
> 7) The Cargo was loaded, in full or in part on the ship M/V SWIFT FORTUNE between the 3rd and the 5th of September, 2005 during which time ownership of the Cargo was vested in the present owners of such Cargo;
>
> 8) As a result of the breach of the COA, Phoenix suffered a loss in the sum of USD $388,403.63;
>
> 9) The present owners of the Cargo were the owners at the time [of] the alleged b reach of contract and are directly liable towards the Plaintiff for such breach;

[35] In paragraph 3, Phoenix alleges that it entered into a contract of affreightment with Kremikovtzi which, at the time, was acting on its own behalf and on behalf of the prospective owners of the cargo.

[36] At paragraph 5, Phoenix alleges that the prospective owners of the cargo, directly or indirectly through Kremikovtzi, fixed the cargo intended for their ship with another vessel.

[37] At paragraphs 7 and 8, Phoenix alleges that the cargo was loaded on the "other vessel" between September 3 and September 5, 2005, and adds that as a result of the breach of the contract, it suffered a loss of US $388,403.63.

[38] Phoenix alleges, at paragraphs 7 and 9 of the Statement of Claim, that those who were the owners of the cargo on September 13, 2005, i.e. the date the action was commenced, were also the owners of the cargo following its loading onboard the ship. It is also alleged in these paragraphs that

those who were the owners of the cargo on September 13, 2005 were also the owners thereof when the contract of carriage was breached.

[39] I agree that the Statement of Claim could have been drafted with more precision. However, the fact is that there cannot be much doubt, in my view, that Phoenix is alleging that those who owned the cargo at the time that the action was commenced, also owned it when the cause of action arose. Whether Kremikovtzi is clearly identified as the owner of the cargo at all relevant times is, in my respectful view, immaterial. What matters is that Phoenix has asserted with sufficient clarity that those who owned the cargo, at all times material to the Court's assertion of *in rem* jurisdiction pursuant to subsection 43(3) of the Act, are in breach of the charter party. Thus, the Statement of Claim clearly includes an *in personam* claim against the owners of the cargo and meets the requirements of subsection 43(3).

[40] In *Waterside Ocean Navigation, supra*, Mr. Justice Thurlow was confronted with a Statement of Claim which was lacking in precision, but he nonetheless concluded, at page 262, that the Statement of Claim contained an allegation of personal liability against the shipowners. He wrote:

> However, deficient as the statement of claim is in alleging any basis for personal liability of anyone but International, it does assert a claim against the owners **whoever they may** be and against the ship for damages in respect of the alleged breaches of the charter […]
>
> [Emphasis added]

[41] He returned to this point at pages 264 and 265, where he said:

> […] It follows, in my opinion, that the claim of the plaintiff against the ship in this action, which is essentially a claim against the owners, **whoever they may be**, is not shown to be frivolous or vexatious or an abuse of the process of the Court.
>
> [Emphasis added]

[42] I therefore cannot conclude that Phoenix's Statement of Claim does not disclose a valid cause of action. In my view, the Statement of Claim discloses an *in personam* claim against the owners of the cargo arrested on September 13, 2005 and, as a result, it is not plain and obvious that it cannot succeed.

[43] There remains for determination the issue of beneficial ownership of the cargo, to which I now turn.

BENEFICIAL OWNERSHIP

[44] Kremikovtzi argues that it was not the beneficial owner of the cargo either at the time that the action was commenced or at the time that the cause of action arose. Consequently, it says that Phoenix's action *in rem* cannot be maintained. Thus, the question to be answered is whether, in the words of Thurlow A.C.J. in *Waterside Ocean Navigation, supra*, "it is clear that the action is frivolous or vexatious …and to permit the action to proceed is an abuse of process". In my view, the answer to that question is no.

[45] Because Kremikovtzi brought this part of its motion under Rule 221(1)*(c) and (f)*, it was allowed to lead evidence. Before turning to the evidence adduced by the parties, a few words must be said concerning the breach date since the parties are not in agreement in regard thereto. This

issue arises because of the requirement of subsection 43(3) of the Act that ownership be shown in respect of both the date of the action and the date of the breach. Phoenix says that the breach date, i.e. when the cause of action arose, is when Kremikovtzi loaded the cargo onboard the "SWIFT FORTUNE". Kremikovtzi, on the other hand, argues that the cause of action arose when the "SWIFT FORTUNE" was chartered to carry the cargo of coal, i.e. a date which is prior to the loading of the cargo in Vancouver.

[46] Mr. Pamel, counsel for Phoenix, conceded at the hearing that should we conclude that the cause of action arose prior to the loading of the cargo, the appeal must necessarily succeed. He argued, however, that that is not the case. More particularly, he said that the date of the crystallization of the cause of action occurred when Kremikovtzi loaded the cargo in Vancouver. He further argued that until that event occurred, Kremikovtzi could have met its contractual obligations towards Phoenix.

[47] Mr. Bromley, counsel for the Kremikovtzi, took a different approach. He submitted that by reason of paragraph 5 of the Statement of Claim, it was apparent that Phoenix had taken the position that the cause of action arose when the prospective owners of the cargo had chartered the "M/V SWIFT FORTUNE". He then said that if that position was wrong, the breach occurred when Phoenix's vessel, the "FAR EASTERN MARINA", was not accepted and the "SWIFT FORTUNE" was fixed. At paragraph 55 of his Supplementary Memorandum of Fact and Law, Mr. Bromley summarizes his position as follows:

> 55. The alleged breach of the contract of affreightment occurred when the nominated vessel was not accepted. A further breach is the fixture of an alternate vessel. The right to commence an action arises at either point. The accrual of a cause of action

> does not depend on when the plaintiff moves to enforce its right, but rather when the right to do so occurs.

[48] After careful consideration of both sides' arguments and in light of the evidence presently before us, I am unable to conclude that Phoenix's position to the effect that the cause of action arose upon the loading of the cargo is without merit. I would add that I cannot agree with Mr. Bromley's submission that paragraph 5 of the Statement of Claim makes it clear that Phoenix has taken the view that the cause of action arose when the ship was chartered. In my opinion, the Statement of Claim can also be read as constituting an allegation that the breach occurred when the cargo was loaded onboard the ship in Vancouver.

[49] Consequently, in addressing the issue of beneficial ownership, I will assume that Phoenix's cause of action arose when the cargo was loaded on the ship in Vancouver. Thus, the question is whether Kremikovtzi has succeeded in demonstrating that it was not the beneficial owner at the time that the action was commenced, i.e. September 13, 2005, and/or at the time that the cause of action arose, i.e. September 3 to 5, 2005 and, thus, that Phoenix's action *in rem* is devoid of merit.

[50] I now turn to the evidence adduced by the parties with respect to the beneficial ownership of the cargo.

[51] In support of his argument that Kremikovtzi was not the beneficial owner of the cargo at the times relevant to the Court's exercise of jurisdiction *in rem* under subsection 43(3), Mr. Bromley relied on a sales agreement between Kremikovtzi and Elk Valley Coal Corporation ("Elk Valley"),

a financing agreement between Kremikovtzi and Stemcor U.K. Ltd. (“Stemcor”) and the affidavits of Mr. Ken Myers, the Treasurer of Elk Valley, sworn September 9 and September 20, 2005. He also relied on the affidavit of Ms. Tanya Tzekova, the Financial Director of Kremikovtzi, sworn September 9, 2005.

[52] Mr. Bromley argues that Elk Valley remained the owner of the cargo, at the very least until September 13, 2005. In support of that proposition, he pointed out that the sales agreement between Elk Valley and Kremikovtzi provided that title to the cargo would only pass when Elk Valley was paid. Thus, since Elk Valley had not been paid by September 13, 2005, it remained the owner of the coal. Mr. Bromley also pointed to the fact that pursuant to the financing contract between Stemcor and Kremikovtzi, the latter would not become the owner of the cargo until such time as the seller had been paid.

[53] In making his submission, Mr. Bromley referred us to the decision of the House of Lords in *“ALIAKMON”*, [1986] 2 Lloyd’s Rep. 1, and to the decision of the English Court of Appeal in *In Re Wait*, [1927] 1 Ch. 606 (C.A.), which, in his view, stand for the proposition that a prospective buyer of goods does not obtain an equitable interest in the goods where title has not passed.

[54] In support of its position that Kremikovtzi was the beneficial owner of the cargo at the relevant times and that, in any event, it is not plain and obvious that the position asserted by Kremikovtzi is the correct one, Phoenix makes a number of points.

[55] First, it says that Ms. Tzekova's affidavit should not be given any weight, since it is simply a bald statement to the effect that Kremikovtzi was not the owner of the cargo loaded in Vancouver.

[56] Second, Phoenix points to the fact that Mr. Myers, in his first affidavit, stated in unequivocal terms, at paragraph 4 thereof, that "Elk Valley sold the cargo on an FOB basis and, therefore, continued to own it until it passed the ship's rail". On the basis of that statement, Phoenix argues that Kremikovtzi became the owner of the cargo once it was loaded. Thus, as of September 5, 2005, Kremikovtzi was the owner.

[57] Third, Phoenix says that Kremikovtzi's argument that it did not become the owner of the cargo until full payment was made to Elk Valley is not in accordance with Mr. Myers' statement that Elk Valley ceased to be the owner upon the cargo passing the ship's rail. In that regard, Phoenix refers to its cross-examination of Mr. Myers, held on September 21, 2005, where at pages 5 and 6, the following exchange appears:

> Q. Sir, in paragraph 4, you describe the cargo being sold on an FOB basis; is that a true statement?
>
> A. That's true.
>
> Q. You also indicate that Elk Valley continued to own the coal until it "passed the ship's rail;" is that a true statement?
>
> A. That's a true statement.
>
> Q. And I understand that phrase, "passing the ship's rail," to mean until the time that the coal was loaded onto the ship?
>
> A. That's correct.
>
> Q. And by "the ship", we're all clear that we're referring to the vessel, Swift Fortune?

A. That's correct.

[58] Finally, Phoenix says that the fact that both the sales and financing agreements provide that Kremikovtzi will not become the owner until the date on which Elk Valley receives payment under the letters of credit, is not, in any event, determinative of the issue of beneficial ownership. Relying on a number of authorities, namely, *Hendrickson v. Mid-City Motors Ltd.*, 1951 CarswellAlta 13 (Alta. S.C.), *Minister of National Revenue v. Wardean Drilling Ltd.*, [1969] 2 Ex. C.R. 166 and *R. v. Bérou Construction Inc.*, 1999 CanLII 9102 (Fed.C.A.), Phoenix argues that notwithstanding the reservation of title clause found in the contractual documents, Kremikovtzi became, upon the loading of the cargo on the ship, the beneficial owner of the cargo in that it had control and possession of the cargo, it bore the risks of loss, damage and destruction, and it had the right to dispose of the cargo.

[59] Phoenix also argued that the contract of sale between Kremikovtzi and Elk Valley was made on FOB delivery terms which, in its view, means that possession, use and risk of loss passed to the buyer upon the loading of the cargo on the ship.

[60] Finally, Phoenix says that the cases relied on by Kremikovtzi and, more particularly, *In Re Wait, supra*, are distinguishable on the basis that at issue in those cases was the sale of unascertained goods which, it submits, is not the situation in the present matter.

[61] There is no easy answer to the question of beneficial ownership raised by Kremikovtzi. However, I am satisfied, on the evidence before us, that Phoenix has an arguable case that

Kremikovtzi was the beneficial owner, both at the time that the cause of action arose and at the time of the commencement of the action. Consequently, Phoenix's action is neither frivolous nor vexatious, and it does not constitute an abuse of the Court's process.

AMENDMENTS TO THE STATEMENT OF CLAIM

[62] One final point. Kremikovtzi argues that the Judge erred in allowing Phoenix to amend its Statement of Claim. In its view, it was wrong for the Judge to allow Phoenix to make amendments after the making of his Order. In other words, Kremikovtzi argues that Phoenix could not cure, by subsequent amendments, the pleadings which led to the arrest of the cargo.

[63] Because of the conclusions which I have reached in regard to the other issues, which conclusions were reached on the basis of the pleadings as they stood on September 15, 2005, when the Judge made his Order, I need not address the issue of the amendments.

DISPOSITION

[64] For these reasons, I would dismiss the appeal with costs.

"M. Nadon"
J.A.

"I agree.
A.M. Linden, J.A."

"I agree.
K. Sharlow, J.A."

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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