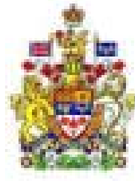
Federal Court of Appeal  Cour d'appel fédérale

Date: 20100811

Docket: A-253-10

Citation: 2010 FCA 209

Present: **EVANS J.A.**

BETWEEN:

ALPHA TRADING MONACO SAM

Appellant

and

THE SHIP "SARAH DESGAGNES" and
THE OWNERS OF ALL OTHERS INTERESTED IN THE SHIP
"SARAH DESGAGNES" and TRANSPORT DESGAGNES INC. and PETRO-NAV INC.

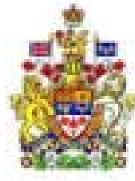
Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on August 11, 2010.

REASONS FOR ORDER BY: **EVANS J.A.**

Federal Court of Appeal



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REASONS FOR ORDER

EVANS J.A.

[1] I have before me a motion in writing by the Appellant pursuant to rule 369 of the *Federal Courts Rules* seeking a stay of execution of a Federal Court judgment pending the disposition by this Court of an appeal from that judgment.

[2] In the judgment under appeal, Justice Harrington (Judge) ordered the Appellant to cause the release of the Respondent vessel, "Sarah Degagnés", from conservatory arrest in Belgium, where it

is being held to secure a claim by the Appellant in a proceeding in Italy against the vessel's subtime charterer, an Italian company (MFN), for unpaid invoices for bunkering services provided to the "Sarah Degagnés" at various locations at the request of MFN.

[3] MFN subsequently became bankrupt. The law of Belgium appears to permit the arrest of a ship to secure a debt for supplies ordered by a time-charterer in circumstances that the law of Canada does not.

[4] The Judge granted the order at the instance of the Respondents, the vessel, its owners, and its long-term time charterer, who requested an anti-suit interlocutory injunction to obtain the vessel's release. He held that the Appellant's action was vexatious and oppressive because the ship had previously been released from arrest in Canada on an undertaking by the Respondents to post bail; the Appellant had unilaterally amended its statement of claim in its Canadian action by limiting it to one of the eleven invoices for bunkering services previously relied on; and the Appellant had re-arrested the ship in Belgium as security for its claim on the other ten invoices.

[5] In view of the urgency of this matter, my reasons will be brief. In my opinion, a stay is appropriate on the facts of this case; in order to minimise harm to the Respondents, the appeal from the Federal Court's judgment will proceed on an expedited basis.

[6] In order to obtain the stay, the Appellant must satisfy the three-pronged test formulated in *RJR-MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311: that there is a serious

question to be decided on the appeal, refusing the stay is likely to cause irreparable harm to the Appellant, and the balance of convenience favours staying the order pending the disposition of the appeal.

[7] The existence of a serious question is a relatively easy condition to satisfy. The central issue in the appeal will be whether the Judge erred in concluding that that the Appellant's arrest of the "Sarah Desgagnés" in Belgium was vexatious and oppressive so as to warrant the order that it be released.

[8] In support of its position that the Judge's conclusion is erroneous, the Appellant says, among other things, that: it was entitled to take advantage of a legal remedy available to it under Belgian law in order to obtain security for the claim that it was properly pursuing against MFN in an Italian court; the Judge erred in finding that the Appellant had attorned to the jurisdiction of the Federal Court by serving an *in rem* statement of claim against the "Sarah Desgagnés" and by arresting her in connection with the eleven invoices for bunkering services when it had already commenced proceedings against MFN and the vessel in Italy; and the Judge should have conducted a *forum non conveniens* analysis before reaching his conclusion.

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[9] Whether any or all of the Appellant's arguments will prevail when the appeal against the anti-suit interlocutory injunction is heard I do not, of course, know. However, on the basis of the Appellant's submissions and the Respondents' very brief response on this aspect of the *RJR*-

MacDonald test, I conclude that there is a serious question to be tried on the appeal, and that the first prong of the test is therefore satisfied.

[10] The Appellant relies principally on two considerations to establish that it will likely suffer irreparable harm if no stay is granted. First, if the “Sarah Desgagnés” is released from arrest it will leave Belgium, and not return there. In the absence of the deposit of bail in a Belgian court by the Respondents, the Appellant would thus lose its security in the event that its claim in Italy against MFN succeeds. Further, since MFN is bankrupt, any judgment against it obtained by the Appellant would not otherwise be satisfied. Second, if the ship is released now, the Appellant’s appeal against the Judge’s order will be rendered nugatory. It will, in effect, have been denied its right to appeal.

[11] In my opinion, this is sufficient to establish that the Appellant will likely suffer irreparable harm if the “Sarah Desgagnés” is released before the determination of the appeal. The fact that the Respondents have posted bail in the Federal Court in respect of their potential liability is immaterial.

[12] As for the balance of convenience, the Appellant says that it would suffer greater harm if a stay were refused than the Respondents would if it were granted. This is because, the Appellant submits, any financial and reputational harm that the Respondents may suffer as a result of the continued arrest of their vessel can be compensated for in damages should they prevail on the merits of the Appellant’s claim against them.

[13] The Respondents make several points in reply. First, they allege that the Appellant is already in breach of the Judge's order to cause the release of the vessel "forthwith". I do not agree. A judgment of the Federal Court should not be interpreted, or regarded, as denying a party an effective opportunity to exercise its right of appeal to this Court. Second, the Respondents are concerned that the Appellant will use the appeal as a delaying device. This concern can be met by ordering that the hearing of the appeal be expedited. Third, the Respondents submit that it is in some way improper for the Appellant to seek to take advantage of what they describe as "an anomaly" in Belgian law. However, that is a matter more properly investigated in the appeal from the Judge's order.

[14] The Respondents submit in the alternative that if a stay is granted, it should be conditional on the Appellant's depositing $2.5 million into Court as counter-security for damages suffered by the Respondents as a result of their failure to cause the release of the "Sarah Desgagnés" from conservatory arrest in Belgium. I agree with the Appellant that there is no basis for such a condition in this case.

[15] For these reasons, I would grant the stay requested by the Appellant and order that the appeal proceed on an expedited basis.

"John M. Evans"
J.A.