IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Hansen v. The Trinity (Ship),***
2007 BCSC 225

Date: 20070216
Docket: 06-3715
Registry: Victoria

Between:

Ian Hansen and Coral Jordeen Hansen

Plaintiffs

And:

The Ship "Trinity"
and the Owners and all others interested in her

Defendants

Before: The Honourable Mr. Justice Johnston

Reasons for Judgment

Counsel for the Plaintiffs:	G.D. Williams
Counsel for the Defendants:	P. Guy
Date and Place of Hearing:	20060901
Submissions Received:	20070105; 20070112; 20070115; 20070131; 20070202 and 20070205
	Victoria, B.C.

[1] The defendants apply to set aside a warrant to arrest the sailboat "Trinity". The warrant was issued pursuant to the order of Shabbits J. of August 22, 2006, following a "without notice" hearing. The defendants say that there was material non-disclosure by the plaintiffs in the application made to Shabbits J. and, for that reason, the warrant should be set aside.

[2] In the alternative, the defendants ask that the warrant be set aside on posting of a reasonable amount for security or bail.

[3] In their statement of claim the plaintiffs allege that in March 2004, they entered into an oral contract with ACU Marine Ltd. ("ACU") and Reginald and Claire Wittman, shareholders and directors of ACU (collectively called the "Owners"). Under that contract, the plaintiffs assert that the Owners undertook to complete a steel hulled sailboat, then partly built, in return for which the plaintiffs were to pay some $600,000.

[4] The plaintiffs plead that between March 2004 and March 2005 they paid $316,000 to the Owners.

[5] The plaintiffs allege that in April 2005 the Owners delivered the sailboat to the plaintiffs, but that, on inspection by the plaintiffs, one or more hull plate welds were found to be sufficiently inferior to amount to a fundamental breach by the Owners. The plaintiffs' claim in these terms:

> 15. As a consequence of the breaches referred to in paragraph 14 above, the Owners and each of them failed to make proper delivery of the Vessel contracted for. The Owners and each of them were in breach of, and repudiated, the Contract.

> 16. On or about April 2005 the Plaintiffs elected to accept the Owner's (sic) breach of the Contract and terminated the Contract, demanding the return of the $316,000 purchase price instalments.
>
> 17. Despite the Plaintiffs' demand the Owners and none of them have failed to return any of the instalments.
>
> ...
>
> 19. In the alternative to paragraphs 15 and 15 (sic) above, the Plaintiffs rescinded the Contract on the basis of those fundamental breaches by the Owners referred to above, and the Owners elected to terminate the Contract. The Owners wrongfully retained the instalment payments without quantifying damages, despite demands made by the Plaintiffs for return of the monies and that they quantify damages which damages were and remain specifically denied.

[6] The statement of claim pleads *quantum meruit* and *quantum valebant* (sic), unjust enrichment, negligence, breach of a contractual duty of good faith, and promissory estoppel.

[7] The statement of claim then pleads:

> 35. The Plaintiff says this claim is subject to the principles of *Canadian Maritime Law*.
>
> 36. The Plaintiffs' claim an equitable (sic) interest in the Vessel in respect of the amount of unreturned purchase price instalments of $316,000.

[8] The plaintiffs had previously sued the defendants for damages in Action No. 05/2432. That action was commenced in May 2005. In that earlier action, among the same parties, for the same damages, the plaintiffs applied for a *Mareva* injunction on August 9, 2005. That application came on before Macaulay J. who dismissed it. In oral reasons, Macaulay J. said:

> 14. Having reviewed the materials, I can find no evidence that the defendants were contractually obligated to build to an ABS standard, nor, assuming that ABS does represent the applicable trade standard, is there any evidence that the failure to meet it in a specific weld supports the conclusion that the vessel is not seaworthy. It follows that I am not persuaded on the evidence before me that the plaintiffs have established a strong *prima facie* case of fundamental breach. A breach that does not go to the fundamental terms of the contract would not entitle the plaintiffs to rescind.

[9] On September 30, 2005 Ralph J. granted an order permitting the plaintiffs to conduct inspection of the vessel "Trinity" including ultrasound examination of welds.

[10] The damage action in which the orders of Macaulay J. and Ralph J. were granted was set for trial in March 2006, but that trial was adjourned generally.

[11] This action was commenced by endorsed writ of summons on August 21, 2006, and on August 22, 2006 the plaintiffs applied for an arrest warrant by filing an "Affidavit to Lead Warrant" pursuant to Rule 55(9). The Rules require an affidavit in Form 109.

[12] The affidavit tendered was not precisely in the terms provided in Form 109, because counsel used the form provided in the Rules of the Federal Court for affidavit to lead warrant.

[13] The registrar of this court referred the matter to Shabbits J. Plaintiffs' counsel appeared and spoke to the matter and Shabbits J. ordered the warrant that is now under attack.

[14] The defendants argue that the plaintiffs had a duty to make full and frank disclosure on their application before Shabbits J. because it was without notice to

the defendants. The defendants say that the plaintiffs failed to make the required disclosure to Shabbits J., and, for that reason, the warrant for arrest should be set aside.

[15] In particular, the defendants say that the failure by counsel to inform Shabbits J. of these material facts: that in the first action there had been an application for a *Mareva* injunction; that the application had been denied; and the reasons that the application was denied.

[16] The plaintiffs respond by arguing that this is an action *in rem*, and brought under Canadian maritime law. In such an action, they say a warrant for arrest is something to which the plaintiffs are entitled, if not as a matter of right, then very close to it. The plaintiffs argue that the disclosure issue is irrelevant to the issuance of a warrant to arrest the vessel "Trinity". The plaintiffs say that the defendants are applying the wrong principles, derived from ex parte or without notice applications for injunctive relief such as *Mareva* orders, to a remedy in maritime law to which a plaintiff is entitled virtually as a matter of right.

[17] The existence of the earlier action was disclosed to Shabbits J. on the application for the arrest warrant, as a “parallel action” that in due course the plaintiffs intended to join with the *in rem* action with which Shabbits J. was dealing.

ANALYSIS

[18] The plaintiffs argue that the failure to inform Shabbits J. of the failed attempt to obtain a *Mareva* injunction in parallel proceedings was not a material non-disclosure because the requirements to obtain a *Mareva* injunction are quite different than the requirements to obtain an arrest warrant. The plaintiffs point to the requirements to obtain an arrest warrant under the Rules for Regulating the Practice and Procedure in the Federal Court of Appeal and the Federal Court SOR/98-106. ("Federal Court Rules").

[19] Federal Court Rule 481 reads as follows:

> 481. (1) A designated officer may issue a warrant for the arrest of property in an action in rem, in Form 481, at any time after the filing of a statement of claim.
>
> Affidavit
>
> (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 jurisdiction of the Court;
>
> (c) that the claim has not been satisfied;
>
> (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
>
> (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.

[20] Because this action was commenced in this court, the provisions governing application for and issuance of a warrant to arrest the vessel are Rules 55(9), (10) and (11) of the Rules of Court;

> **Arrest — "Affidavit to Lead Warrant"**
>
> (9) A party may, at any time after an action *in rem* has been commenced, apply for a warrant for the arrest of the property named by filing with the registrar an "Affidavit to Lead Warrant" in Form 109.
>
> **Issue of warrant**
>
> (10) The registrar may, after reading the affidavit,
>
> (a) issue the warrant, or
>
> (b) refer the matter to the court and the court may issue the warrant, subject to any directions that the court may give.
>
> **Form of warrant**
>
> (11) A warrant to arrest under this rule shall be in Form 110.

[21] The rules of both the federal court and this court provide that whether or not a warrant issues is a matter of discretion.

[22] The plaintiffs argue that, in the federal court at least, any discretion over whether a warrant should issue is rarely exercised against the applicant for the warrant. The plaintiffs cite the decision of Hargrave, Prothonotary, in ***Kiku Fisheries Ltd. v. Canadian North Pacific Ocean Corp.***, [1997] F.C.J. No. 1291 (T.D.) at para. 45:

> 45 Counsel did refer to *Armada Lines Ltd. v. Chaleur Fertilizers Ltd.*, [1995] 1 F.C. 3, a decision of the Federal Court of Appeal. A portion of the decision dealing with wrongful arrest was overturned by the Supreme Court of Canada. However, the comments of the Court of Appeal, or perhaps what were the views of the Court, are an interesting gloss on Rule 1003(2) dealing with the content of the affidavit to lead warrant. The Court of Appeal recognized that the Rule sets out the criteria necessary in order to obtain an arrest warrant. The Court also considered the somewhat more onerous requirements for obtaining a *Mareva* injunction, including full and frank disclosure of all material matters within the plaintiff's knowledge and of providing full particulars of the claim, including fairly stating the points made against the plaintiff by the defendant. Now this is quite laudable, but it is not required on the plain wording of Rule 1003(2) which requires the affidavit to set out:
>
> > (a) the name, address and occupation of the applicant for the warrant; (b) the nature of the claim; (c) that the claim has not been satisfied; (d) the nature of the property to be arrested ...
>
> In commenting on this Rule in *Lorac Transport Ltd. v. The "Atra*" (1984), 9 D.L.R. (4th) 129, Mr. Justice McNair, apropos of the "*Atra*", noted that there was nothing in the Rule requiring disclosure of beneficial ownership and that if that were a necessary averment it would have been set out in the Rule (p. 133). In my view one need not go beyond a reasonable interpretation of the disclosure required by the Rules.

[23] It is apparent that in arriving at his decision the Prothonotary relied upon the decision of the federal Court of Appeal in ***Armada Lines Ltd. v. Chaleur Fertilizers Ltd.***, [1995] 1 F.C.3 (C.A). The applicable point is set out at pp. 19 and 20:

> 32. In the case of *Elesguro Inc. v. Ssangyong Shipping Co. Ltd.*, [FN29] Mr. Justice Collier expressed the view that the guidelines set out in the English cases for the issuance of a *Mareva* injunction should be applicable to Canadian maritime law. The guidelines to which he refers, are set out by Denning M.R. in the *Third Chandris* case. [FN30] By these guidelines, a plaintiff seeking a *Mareva* injunction must:
>
> > (i) make full and frank disclosure of all material matters within his knowledge;

(ii) provide full particulars of his claim;

(iii) give grounds for believing that the defendants have assets within the jurisdiction;

(iv) give some grounds for believing that there is a risk that the asset will be removed before the judgment or award is satisfied; and

(v) give an undertaking in damages -- in case the plaintiff fails in its claim or the injunction turns out to be unjustified.

33. Rule 1003 [as am. by SOR/79-57, s. 18; SOR/92-726, s. 12; SOR/94-41, s. 7] of the *Federal Court Rules* [C.R.C., c. 663] sets out the criteria necessary for the granting of a warrant for the arrest of property in an action *in rem*. In my view, the guidelines set out in the *Third Chandris* case are consistent with the criteria established by Rule 1003. In each instance, the onus is undoubtedly cast upon the plaintiff to show that the arrest requested is necessary for the protection of its rights. Requirement (v) in the *Third Chandris* case, the undertaking in damages, clearly demonstrates that the plaintiff, who seeks the arrest, must carry the risk and burden of an illegal arrest, and the consequences flowing therefrom. While Rule 1003 does not specifically require an undertaking as to damages for wrongful arrest, I think it to be a necessary inference that the plaintiff assumes the consequences of such an arrest. The English authorities support the view that damages are payable where the arrest is without a proper legal foundation. [FN31] In my view, when a plaintiff seeks to arrest a ship or its cargo pursuant to Rule 1003, the plaintiff carries the burden of showing that the arrest was lawfully carried out.

[24] It is apparent, to me at least, that the federal Court of Appeal endorsed the application of guidelines applicable to *Mareva* injunctions when it said "In my view, the guidelines set out in the *Third Chandris* case are consistent with the criteria established by Rule 1003" and I note that the federal Court of Appeal then went on to apply one of those criteria to the case before it.

[25] An appeal from this decision was allowed by the Supreme Court of Canada, see: [1997] 2 S.C.R. 617. That court set aside the award of damages for wrongful

arrest, granted by the Federal Court of Appeal, as contrary to the common law rule that damages could be ordered only if a plaintiff had acted in bad faith or with gross negligence. The Supreme Court of Canada pointed out that the Federal Court Rules did not require an undertaking in damages from a plaintiff seeking a warrant to arrest. I note that Rule 55 of the Rules of Court does not require an undertaking in damages, as is set out in Rule 45 (6), relating to injunctive relief.

[26] I conclude, partly on the basis of the above passage from ***Armada Lines***, and partly on the basis that an application without notice for a remedy that is within the discretion of the court to grant or to refuse, that full and frank disclosure is required when an application is made for an warrant to arrest a vessel under Rule 55 of the Rules of Court.

[27] In my view, the combined effect of the decisions of the Federal Court of Appeal and of the Supreme Court of Canada in ***Armada Lines*** do not directly address this point. The similarity of purpose and effect between *Mareva* injunctions and arrest, coupled with the obligations that should in my view properly be fulfilled by a party who seeks a remedy without notice to an opposing party, and without giving the opposing party an opportunity to respond or to explain, require full and frank disclosure whenever a party or counsel appear without notice before a judge or judicial officer seeking relief.

[28] As for the argument that it was not material to the application for a warrant to arrest the vessel that the applicant had previously sought and been refused a *Mareva* injunction in collateral proceedings, I do not agree. The fact of the

application, and the reasons for the prior refusal of a *Mareva* injunction were, in my view, material and should have been disclosed. This is particularly so because the plaintiffs led evidence in support of the application for the *Mareva* injunction that failed to persuade Macaulay J. that they had a strong *prima facie* case of fundamental breach, and entitlement to rescind the contract.

[29] I consider that information essential whether or not a warrant to arrest a vessel might be granted virtually as a matter of right in federal court. It goes directly to the merits of the asserted *in rem* claim upon which the application for the warrant is founded.

[30] On that ground alone, I set aside the warrant to arrest in this case.

[31] I had questioned whether, on the pleadings, the claims in this action were truly *in rem*. I asked counsel for further submissions on the point raised by this statement by Irving J. in ***Fry v. Botsford*** (1902), 9 B.C.R. 234, at p. 239:

> An action *in rem* has been defined as a proceeding to determine the status or condition of the thing itself, and a judgment is a decision as to the disposition of the thing.

[32] It seemed to me that the plaintiffs here had disclaimed any interest in Trinity when they elected to treat the contract at an end and sue for the return of the money they had paid on account. It also seemed to me that there was no judgment in this action that would possibly determine the status or condition of the Trinity, or its disposition, apart, of course, from the effect of the warrant of arrest. Since the arrest

warrant must depend for its existence on there being a proceeding *in rem,* it cannot at the same time provide the foundation for such an action.

[33] I am obliged to counsel for their careful and thorough arguments on this question. I am persuaded by those arguments that I ought not to go where I do not need to go to dispose of the application before me. I therefore do not decide on this application whether, on the pleadings in this action, there is a valid *in rem* claim raised.

[34] The warrant will be set aside, with costs to the defendants. The parties may speak to the appropriate scale if they are unable to agree.

"R.T.C. Johnston, J."
The Honourable Mr. Justice R.T.C. Johnston