Striebel v. Chairman (The), 2002 FCT 545, [2002] 4 FC 377

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T-687-02

2002 FCT 545

Mr. and Mrs. Stephen Striebel (*Plaintiffs*)

v.

Sovereign Yachts (Canada) Inc., the Owners and All Others Interested in the Motor Vessel "*Chairman*", also known as Sovereign Hull Number 7644 (*Defendants*)

Indexed as: Striebel v. *Chairman* (The) (T.D.)

Trial Division, Hargrave P.--Vancouver, May 6 and 10, 2002.

Maritime Law -- Liens and Mortgages -- Yacht not completed on time under contract, extensions -- Plaintiffs electing to take possession as mortgagees -- Ex parte order putting sheriff into possession, giving plaintiffs leave as owners to work on vessel, allowing defendant builder to apply to vary, set aside order -- Plaintiffs' motions for leave to have sheriff take possession of partially constructed vessel, move it to another location for completion, allowed; defendants' motion to vary order putting sheriff into possession dismissed -- Federal Court Rules, 1998 eliminating automatic possession in sheriff on arrest -- Arresting party must demonstrate, as reasonable plausibility, in sense of acceptable reason with fair expectation as to trustworthiness, vessel ought to be in protective care of sheriff --

Plausible evidence including builder's inability to control petty vandalism, obstructionism, harassment, intimidation by employees -- General rule once mortgagee takes possession, has control of vessel for all purposes necessary to realize on security -- Under shipbuilding contract plaintiffs entitled to move vessel to another location for completion -- Arbitration, provided for under contract, not invoked, but not providing speedy interim remedy to get vessel completed -- Security extending to all articles necessary to make ship going concern, whether aboard, or subsequently brought aboard.

Maritime Law -- Practice -- 106-foot yacht not completed by date agreed upon -- Plaintiffs taking possession as mortgagees -- Ex parte order putting sheriff into possession, giving plaintiffs as owners to work on vessel, allowing defendant builder to apply to vary, set aside order -- Rescission of ex parte order discretionary -- Onus on party seeking rescission to establish rescission proper -- Thus onus on defendant to show relevant material facts differed from those upon which ex parte order granted -- Plausible evidence builder's employees committing petty vandalism, obstructionism, harassment, intimidation -- Yacht very valuable -- Danger of putting vessel at risk by advertising motion to put sheriff in possession justified ex parte hearing, particularly since putting sheriff in possession no inconvenience to builder as vessel already arrested -- Facts submitted by builder in challenging order for possession not of material nature sufficient to require change to ex parte order -- Court ought to uphold placing sheriff in possession if any possibility possession in sheriff of reasonable value.

These were motions by the plaintiffs, as mortgagees and intended owners, for leave to have the sheriff take possession of and protect the 106-foot partly constructed yacht, *Chairman*, and then as mortgagees in possession, to insure and move the vessel to another shipyard for completion. The defendants moved to vary or set aside the order which put the sheriff into possession. On April 29, 2002 the plaintiffs obtained an *ex parte* order putting the sheriff into possession, giving them leave as mortgagees in possession and as intended owners to insure and move the vessel in order to complete it, and allowing the defendant builder to apply to vary or set aside the order.

Held, the plaintiffs' motions should be allowed and the defendants' motion should be dismissed.

(1) The *Federal Court Rules, 1998* eliminated automatic possession in the sheriff on arrest to avoid expense since, in the vast majority of cases, such possession was merely an added cost with no benefit. The fact that the Court is now required to put the sheriff into possession suggests that there must be some objective standard, however low. Clear evidence of irreparable harm, an injunctive standard, is unsuitable as the law relating to injunctions does not apply to ships, and such a standard would be a radical departure from the former practice. Thus, an arresting party need only demonstrate, as a reasonable plausibility, in the sense of an acceptable reason with a fair expectation as to its trustworthiness, that the vessel ought to be put in the protective care of the sheriff. The fact that Sovereign could not control petty vandalism, obstructionism, harassment and intimidation committed by its employees constituted such plausible evidence.

(2) Rescission of an *ex parte* order is discretionary with the onus on the party seeking rescission to establish that rescission is proper. Therefore the onus was on Sovereign to show that relevant material facts differed from those upon which the *ex parte* order was granted. Given the nature of the plausible evidence put forward for putting the sheriff in possession, and the value of the *Chairman*, the danger of putting the vessel at risk, by advertising a

motion to put the sheriff in possession, justified the *ex parte* hearing, particularly since putting the sheriff in possession was no inconvenience to Sovereign, and also since giving the plaintiffs leave to work on the vessel was merely procedural, since the plaintiffs claimed that right under the shipbuilding contract and under their mortgage.

While the shipbuilding contract will be the key document in any trial on the merits, most of it was irrelevant in these interlocutory procedural motions. The facts put in by Sovereign, in challenging the order for possession were not of a material nature sufficient to overthrow or to require change to the *ex parte* order putting the sheriff into possession. A court ought to uphold placing a sheriff in possession if there is any possibility that possession in the sheriff may be of reasonable value. There were no Canadian cases on point for setting aside the mandate of a sheriff who has gone into possession. By putting the sheriff into possession the Court has taken nothing from Sovereign because the plaintiffs were mortgagees in possession before the sheriff went into possession. The *ex parte* order should not be set aside, but a paragraph should be added to make it clear that nothing in the order disturbed the substantive merits of the case.

(3) As a general rule once a mortgagee takes possession of a vessel, he or she has control of the vessel for all purposes which are necessary to realize upon the security, so long as the mortgagee does not use the vessel in a speculative or a hazardous manner. In permitting movement of the vessel to another shipyard for completion, the plaintiffs' rights under the shipbuilding contract were also considered. The contract permitted movement of the vessel to another shipyard for completion in the event of default by Sovereign. If the plaintiffs are wrong, Sovereign will have damages by way of counterclaim and a bond against which to execute. The contract provided for arbitration, but arbitration was not invoked and would not provide a useful speedy interim remedy for getting the *Chairman* completed for the plaintiffs. The arbitration provision also did not prevent the plaintiffs from going into possession as mortgagees or from arresting the vessel.

The security of a mortgagee extends to all fittings, equipment and appurtenances, in short, all the articles necessary to make a ship a going concern, whether aboard or subsequently brought aboard. The plaintiffs may also claim an interest in the ship and its equipment, even items which are physically detached from it, under the warrant of arrest. The plaintiff may build on these common law entitlements through the application of the contract which provided that the builder's mortgage secured to the plaintiffs' "all material, equipment, inventory and other goods created, manufactured, ordered, or delivered for the vessel." The plaintiffs should, at their own risk and expense, have the ability to complete the *Chairman* elsewhere. Sovereign must be fully secured and this will be accomplished by bonding before the *Chairman* is released from arrest.

statutes and regulations judicially

considered

Federal Court Rules, C.R.C., c. 663, R. 1003(1).

Federal Court Rules, 1998, SOR/98-106, r. 481(1).

cases judicially considered

applied:

Cartier, Inc. v. Doe, reflex, [1990] 2 F.C. 234; (1990), 32 F.T.R. 217; 3 T.C.T. 5100 (T.D.); *In re The "Alexander"* (1812), 1 Dods. 278; 165 E.R. 1310.

considered:

North Saskatchewan Riverboat Co. v. 573475 Alberta Ltd. reflex, (1995), 96 F.T.R. 166 (F.C.T.D.); *Gulf Islands Navigation Ltd. v. Seafarers International Union of North America* reflex, (1959), 18 D.L.R. (2d) 216; 27 W.W.R. 652; 59 CLLC 15,425 (B.C.S.C.); *The "Nordglimt"*, [1987] 2 Lloyd's Rep. 470; *Pacific Tractor Rentals (V.I.) Ltd. v. Palaquin (The)* reflex, (1996), 115 F.T.R. 224 (F.C.T.D.).

referred to:

Armada Lines Ltd. v. Chaleur Fertilizers Ltd., 1994 CanLII 3508 (FCA), [1995] 1 F.C. 3; (1994), 170 N.R. 372 (C.A.); *Armada Lines Ltd. v. Chaleur Fertilizers Ltd.*, 1997 CanLII 362 (SCC), [1997] 2 S.C.R. 617; (1997), 148 D.L.R. (4th) 217; 213 N.R. 228; *The "Evangelismos"* (1858), 12 Moo. P.C. 352; 14 E.R. 945 (P.C.); *Magnolia Ocean Shipping Corp. v. The Soledad Maria*, [1982] 1 F.C. 205 (T.D.); *Kiku Fisheries Ltd. v. Canadian North Pacific Ocean Corp.* reflex, (1997), 137 F.T.R. 192 (F.C.T.D.); *Margem Chartering Co. Inc. v. Bocsa (The)*, 1997 CanLII 5351 (FC), [1997] 2 F.C. 1001; (1997), 127 F.T.R. 161 (T.D.).

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MOTIONS by the plaintiffs, as mortgagees and intended owners of a partly constructed yacht, for leave to have the sheriff take possession of the yacht, and then as mortgagees in possession, to move the vessel to another shipyard for completion; by the defendants to vary or set aside the order which put the sheriff into possession; and by the plaintiffs to allow them to insure and to move the yacht to another shipyard for completion. The plaintiffs' motions were allowed and the defendants' motion was dismissed.

appearances:

David F. McEwen for plaintiffs.

Geoffrey B. Gomery and *James C. MacInnis* for defendants.

solicitors of record:

McEwen, Schmitt & Co., Vancouver, for plaintiffs.

Nathanson, Schachter & Thompson, Vancouver, for defendants.

The following are the reasons for order rendered in English by

[1]Hargrave P.: The plaintiffs in this action seek damages arising out of a shipbuilding venture which went wrong. As mortgagees and intended owners of the 106-foot partly constructed yacht *Chairman*, they also seek liberty to have the sheriff take possession of and protect the arrested vessel and then, from the position of mortgagees who have gone into possession, to launch the vessel and to move her to another shipyard for completion.

[2]These reasons arise out of three motions: first, an *ex parte* motion heard 29 April 2002, resulting in an order of 29 April 2002 putting the sheriff into possession and, in view of that and the arrest, giving leave to the plaintiffs, as mortgagees who had gone into possession and as intended owners, the ability to work on the vessel, also being an order which allowed the builder, the defendant, Sovereign Yachts (Canada) Inc. (Sovereign), to apply to vary or set aside the order; second, a motion of Sovereign, heard 6 May 2002, to vary or set aside the order which put the sheriff into possession, a motion resulting in an 8 May 2002 order adding to the initial 29 April 2002 order; and third, a motion of the plaintiffs to allow them to insure and to move the *Chairman*, while under arrest, to another shipyard for completion, which resulted in an order, also of 8 May 2002, to that effect, with an added provision to ensure that Sovereign would be properly secured for any counterclaim, including loss of profit.

[3]The procedure, overall, including movement of an arrested vessel elsewhere for completion by the intended owner, as mortgagee in possession, while not an everyday event, has occurred from time to time. However, because the whole procedure was, in this instance, hotly contested, reasons are in order. I begin with some comment on obtaining the arrest of a vessel.

CONSIDERATION

[4]Counsel for Sovereign seems to look upon ship arrest as an extraordinary remedy akin to injunctive relief. This was the view of the Federal Court of Appeal in *Armada Lines Ltd. v. Chaleur Fertilizers Ltd.*, 1994 CanLII 3508 (FCA), [1995] 1 F.C. 3: the Supreme Court of Canada [1997 CanLII 362 (SCC), [1997] 2 S.C.R 617] disagreed, a point I will touch upon in due course. I now turn to a consideration of the arrest of a ship.

Arrest of a ship

[5]An arrest of a ship is procedural, providing a remedy, but creating no new legal vested rights: see, for example, the decision of Mr. Justice Dubé in *Magnolia Ocean Shipping Corp. v. The Soledad Maria*, [1982] 1 F.C. 205 (T.D.) at page 208; and *Kiku Fisheries Ltd. v. Canadian North Pacific Ocean Corp.* reflex, (1997), 137 F.T.R. 192 (F.C.T.D.), at page 203 and following. The only disclosure required in the affidavit to lead warrant, to obtain the actual warrant for arrest, is that required by the *Federal Court Rules, 1998* [SOR/98-106]. This does not extend to the full and frank disclosure of all matters required on an injunction: see *Kiku Fisheries Ltd., supra*, at page 203 and following.

[6]Once a plaintiff issues a statement of claim *in rem* that plaintiff, except in exceptional circumstances, has a right to invoke the arrest procedure: see *North Saskatchewan Riverboat Co. v. 573475 Alberta Ltd.* reflex, (1995), 96 F.T.R. 166 (F.C.T.D.), at page 169 (the *Edmonton Queen*).

[7]In the *Edmonton Queen* I pointed out that while the then current *Federal Court Rules* [C.R.C., c. 663], subsection 1003(1), which governed the issuance of a warrant, was discretionary, such discretion was rarely exercised against the issuance of a warrant. This observation holds true for the present version of the Rules, being subsection 481(1).

[8]While a plaintiff can, with relative ease, arrest a ship, that is not to say that no harm can then come to a plaintiff by reason of the arrest. As the Supreme Court of Canada pointed out in *Armada Lines Ltd. v. Chaleur Fertilizers Ltd.*, 1997 CanLII 362 (SCC), [1997] 2 S.C.R. 617, at paragraph 20 and following, damages for wrongful arrest may flow, but only in instances of bad faith or gross negligence, upholding the rule in *The "Evangelismos"* (1858), 12 Moo. P.C. 352; 14 E.R. 945 (P.C.). In coming to that conclusion the Supreme Court of Canada rejected the concept, espoused by the Federal Court of Appeal, that an arrest was similar to interlocutory injunctive relief. The arrest of the *Chairman*, contrary to the submissions of counsel for Sovereign, is an acceptable remedy in conjunction with the plaintiffs' position as mortgagee in possession. I now turn to the issue of an *ex parte* order putting the sheriff into possession of the *Chairman*.

Sheriff in possession

[9]In many jurisdictions, including those in which an arrest may be had virtually as a right and here I have in mind England, many of the jurisdictions in the United States and in Canada before the Federal Court came into being, an arrest automatically places or placed the sheriff in possession.

[10]I refer to this conventional practice, of the sheriff or marshal taking possession on an arrest, indeed automatic possession with the arrest virtually as a right, because I have neither been referred to nor am I aware of any Canadian case which sets a standard to meet when applying to have the marshal go into possession. Certainly the standard should be very low if one considers that the likely reason that the *Federal Court Rules, 1998* did away with automatic possession in the sheriff or admiralty marshal was merely to avoid expense, for in the vast majority of instances such possession was merely an added cost, with no benefit. However, the fact that leave of the Court is now required to put the sheriff into possession does suggest that there must be some objective standard, however low the threshold.

[11]The standard of need to be demonstrated in order to put the sheriff into possession must be more than pious hopes and bare chances. Alternately, to require, as submitted by counsel for Sovereign, clear evidence of irreparable harm, an injunctive standard, is completely unsuitable: not only does the law relating to injunctions not apply to an arrest of ships (e.g. see *Chaleur Fertilizers*, *supra*, at paragraph 24 and following), but also to require such a standard would be a radical departure from former practice. Moreover, to apply the injunctive standard would make the role of sheriff in possession meaningless and put a *bona fide* claimant's security in an arrested ship at needless risk. I would also observe that the very nature of ships and shipping operations often makes it extremely difficult for an *in rem* claimant to know with any absolute certainty whether his or her security in a ship is in any absolute jeopardy. For these reasons I would set the test to be met, for putting a sheriff or

marshal into possession of an arrested ship, at a low threshold. In my view an arresting party need only demonstrate, as a reasonable plausibility, in the sense of an acceptable reason with a fair expectation as to its trustworthiness, that the vessel ought to be put in the protective care of the sheriff.

[12]In applying this test of reasonable plausibility of a need to protect the *Chairman*, by putting the sheriff into possession, I do not rely upon actions by Sovereign's management. There may have been a deteriorating and unsatisfactory relationship between Sovereign, on the one hand, and its customers, the plaintiffs and their representative, on the other hand, but I do not see that as relevant. Nor is it a factor in this context that the plaintiffs may have completely lost faith in the ability of Sovereign to produce a quality vessel within any reasonable time frame. Rather, it is that Sovereign was not able to control acts of petty vandalism and obstructionism, apparently by its workforce. Included in the actions of Sovereign's employees was some harassment and intimidation of the plaintiffs' contractors. Further, were that workforce to see the clear loss of longstanding and ongoing work, that could very well compound the problem. It was these workforce factors that I took into account when giving leave to the plaintiffs to put the sheriff into possession. This leads to another portion of the procedure with which Sovereign takes issue, that of the motion to put the sheriff into possession being made *ex parte*.

Ex parte order for possession

[13]An *ex parte* motion is a proceeding taken at the insistence of and for the benefit of one party only, without notice to the person who is adversely interested. As pointed out in *Gulf Islands Navigation Ltd. v. Seafarers International Union of North America* (1959), 18 D.L.R. (2d) 216 (B.C.S.C.), at page 218, the Court must exercise scrupulous care on an *ex parte* application, for restraining damage to one litigant may result in damage to the other side. Thus the first enquiry to make is why notice was not given.

[14]*Ex parte* orders should remain in effect for only a limited time, a time sufficient to protect those about to suffer harm, but not long enough to seriously prejudice the other side. Rescission of an *ex parte* order is discretionary, with the onus on the party seeking rescission to establish that rescission is proper: *Cartier, Inc. v. Doe*, reflex, [1990] 2 F.C. 234 (T.D.), at page 238, a decision of Mr. Justice Pinard. It is therefore for Sovereign, in this instance, to show that relevant material facts differ from those upon which the *ex parte* order was granted. Otherwise the *ex parte* order will not be disturbed.

[15]As I have already noted an arrest and placing a sheriff in possession of a ship is not in any way akin to injunctive relief. Thus, the test for placing a sheriff in possession is low: in my view the test is reasonably plausible evidence that the vessel should have the protection afforded by a sheriff in possession. Here the plausible evidence includes the acts of petty vandalism, obstructionism, harassment and intimidation on the part of Sovereign's employees. The *Chairman* is a large and expensive luxury yacht. It is the view of Sovereign's marine surveyor that, as of 2 May 2002, her value is between $7,800,000 and $8,150,000. The surveyor goes on to say, in his 2 May 2002 report, relying upon his 19 April 2002 inspection, "that the vessel was elaborately and tastefully finished and we would describe some of the finishing, in particular the interior woodwork, as exquisite". The danger of putting the vessel at risk, by advertising a motion to put the sheriff in possession, justified the *ex parte* hearing. This is particularly so not only in that putting the sheriff into possession was no inconvenience to Sovereign, but also giving leave to the plaintiffs, to work on the vessel,

was a procedural matter, given the arrest of the vessel, for the plaintiffs claimed that right under the building contract and under their mortgage. I would also observe that the order gave clear leave to Sovereign to apply to set it aside or to vary it, a right they were allowed to exercise on short leave. I now turn to the submission of Sovereign that there was less than full disclosure in obtaining the initial order.

Full disclosure on applying to put the sheriff into possession

[16]Sovereign notes that when applying to put the sheriff in possession the plaintiffs did not put in the whole of the shipbuilding contract and did not have knowledge of Sovereign's view of incidents that had taken place. While the shipbuilding agreement of June 2000, (the building agreement) will be the key document in any trial on the merits, most of it is irrelevant in these interlocutory procedural motions. The facts put in by Sovereign, in challenging the order for possession, are not of a material nature sufficient to overthrow or to require change to the *ex parte* order putting the sheriff into possession.

[17]I would also add that just as a court will try to salvage a warrant, giving the benefit of any doubt to the arresting party, so a court ought to uphold placing a sheriff in possession if there is any possibility that possession in the sheriff may be of reasonable value. Here I work by analogy. For example, in *The "Nordglimt"*, [1987] 2 Lloyd's Rep. 470 (Q.B.D.), Mr. Justice Hobhouse dealt with an application to set aside or strike out a warrant for arrest, in that it contained inaccurate statements and indeed even a misstatement of fact, which ought to have been picked up. However he went on to say that (at page 474) "it does not automatically follow that the failure to place the proper facts accurately before the Court will invariably lead to the setting aside of the order so obtained." All of this further was considered in *Margem Chartering Co. Inc. v. Bocsa (The)*, 1997 CanLII 5351 (FC), [1997] 2 F.C. 1001 (T.D.), at paragraph 40. I am aware of no Canadian cases on point for setting aside the mandate of a sheriff who has gone into possession. However the effects of an arrest, or an arrest coupled with a sheriff in possession, are in most cases similar. In the present instance the fact that the sheriff has gone into possession, something which does not change the substantive rights of the parties, has had no real effect or hardship upon Sovereign. I would add that the Court, by putting the sheriff into possession, has taken nothing from Sovereign. This is because the plaintiffs were mortgagees in possession before the sheriff went into possession: it is the plaintiffs who, pursuant to their mortgage, dispossessed Sovereign of the *Chairman*.

[18]Taking all of the submissions of Sovereign into account, I am not persuaded I ought to exercise my discretion and set aside the *ex parte* order putting a sheriff into possession.

[19]I have, however, added to the 29 April 2002 order. Counsel for Sovereign was concerned that somehow putting the sheriff into possession and giving leave to the plaintiffs to have new contractors work on the vessel might have affected his client's substantive rights. This term, in the order, is permissive and consistent with the status of a ship under arrest in the situation of the *Chairman*. As already indicated, having new contractors work on a vessel, which is under arrest, has happened from time to time in the past. Such is the prerogative of a mortgage holder who has gone into possession. There is nothing in that order that disturbed the substantive merits of the cases of either the plaintiffs or the defendant, Sovereign, however I have added a paragraph to the order making that clear.

Leave to move the vessel for completion

[20]I now turn to the third motion, that for leave to move the vessel while under arrest to Arrow Marine Services Inc. so that she might be completed, with all fittings, equipment, parts and appurtenances, not only those aboard, but also those belonging to or intended for the vessel, to also go to Arrow Marine Services Inc. The order went on to recognize that some parts and equipment were on order by Sovereign, but that if Sovereign did not feel it could deliver them to the new shipyard, the plaintiffs might supply such parts themselves. Determination of what parts belonged to the vessel is to be made on a joint survey. Finally, the vessel is to be insured for the benefit of all of those who appear to have an interest, including Sovereign and that the arrest by the plaintiffs and any caveat placed against the vessel by Sovereign, were not to be released until the plaintiffs provided Sovereign with an appropriate bond securing Sovereign's reasonable best case, on a counterclaim, together with costs and interest. I now turn to the reasoning which concluded in this order.

[21]The *Chairman* was to have been completed and delivered on 30 June 2001. Taking into account change orders, that date was delayed until 1 September 2001. There were three change orders dated 1 October 2001 which, using the formula set out in the building agreement, allowed a further 120 hours for delivery, past the 1 September. I also note change order number 70, dated 14 November 2001, however that change order does not come into play because it is a redraft of a completed August 2001 change order, the price having been corrected. There is a difference of opinion between counsel as to the effect, if any, of various grace periods: that is for a trial judge to consider.

[22]Among the documents produced is a letter of 18 December 2001 whereby counsel for the plaintiffs puts Sovereign on notice that, because of delay in completion, the plaintiffs intend to take possession of the vessel, together with the goods and materials intended or proposed to be used in its completion and either complete the vessel there, or move the vessel and complete it elsewhere. This apparently resulted in a new construction schedule from Sovereign on 9 January 2002, showing substantial completion by 31 March 2002 and delivery 30 April 2002.

[23]Substantial completion did not come about by the end of March and, clearly, the vessel was not ready for delivery on 30 April 2002. That the *Chairman* was not ready for delivery is borne out by Sovereign's surveyor's report of 22 April 2002, setting out the many general unfinished areas and particular jobs and noting that there was unforeseen late delivery of a number of parts. Indeed, there are hundreds of items left to be done, including some fairly major items, such as the underwater engine exhaust system, exterior doors, air conditioning and portholes. These latter four items are said to result by reason of equipment and fittings not delivered by subcontractors. Counsel for the plaintiffs points to what he says were very late ordering dates, mainly in January and February of 2002, for expected delivery of major equipment, which would take substantial time to install, to Sovereign as much as 10 days before the delivery of the completed vessel to the plaintiffs. These delivery dates have been pushed back further by the suppliers. Fault in that regard is not to be dealt with in this setting. However in my view relations between the plaintiffs, Mr. and Mrs. Striebel, and the defendant, Sovereign, had broken down to the extent that the plaintiffs are justified in seeking some alternative approach.

[24]The plaintiffs initially elected to go into possession as mortgagees in possession. Assuming that their mortgage security was in default they have every right to do so. If the plaintiffs are wrong as to their mortgage being in default, that is something they will have to answer for once a full trial has been held. As a general proposition, once a mortgagee takes

possession of a vessel he or she has control of the vessel for all purposes which are necessary to realize upon the security, so long as the mortgagee does not use the vessel in a speculative or a hazardous manner: see generally J. D. Buchan, *Mortgages of Ships: Marine Security in Canada* (Toronto: Butterworths, 1986), at page 70 and following.

[25]In permitting movement of the *Chairman* to the Arrow Marine Services Inc. yard for completion I took into account not only the position of the plaintiffs, as mortgagees who had gone into possession, but also the rights claimed by the plaintiffs under the building agreement. By section 13 of the building agreement, which is incorporated into the plaintiffs' mortgage, if there is a default under the building agreement by Sovereign, the plaintiffs are entitled to move the *Chairman* to another shipyard for completion. If the plaintiffs are wrong, Sovereign will have damages by way of counterclaim and a bond against which to execute. In giving permission to move for completion I considered the availability of alternative interim remedies under the building agreement, including arbitration. The latter has not been invoked. However, it does not provide a useful speedy interim remedy for getting the *Chairman* completed for the use of the plaintiffs. Moreover, the arbitration provision does not prevent the plaintiffs from either going into possession as mortgagees in possession or from arresting the vessel in order to secure their position.

Right to appurtenances

[26]I now turn to the right claimed by the plaintiffs in the fittings, equipment and appurtenances not yet installed on the *Chairman*, items which are either aboard, in Sovereign's yard, or on order. The security of a mortgagee extends to all fittings, equipment and appurtenances, in short, all the articles necessary to make a ship a going concern, aboard on the date of the mortgage, or subsequently brought aboard: see, for example, B.-M. Constant in *The Law Relating to the Mortgage of Ships* (London: Syren and Shipping Ltd., 1920), at page 15 and the cases there referred to.

[27]From another point of view, the plaintiffs may claim an interest in the ship and its equipment under the warrant of arrest. That is dealt with at length in *Pacific Tractor Rentals (V.I.) Ltd. v. Palaquin (The)* reflex, (1997), 115 F.T.R. 224 (F.C.T.D.). There I began with *In re The "Alexander"* (1812), 1 Dods. 278; 165 E.R. 1310, a case which has given rise to general propositions by past and current text writers to the effect that "A warrant of arrest on a ship covers everything belonging to it as part of its equipment, even items which are physically detached from it": see N. Meeson in *Admiralty Jurisdiction and Practice* (London: Lloyd's of London Press, 1993), at page 124; F.L. Wiswall in *The Development of Admiralty Jurisdiction and Practice Since 1800* (Cambridge: University Press, 1970), at page 184; and *Roscoe on Admiralty Jurisdiction and Practice*, 5th ed. (London: Stevens & Sons, 1931), at page 276.

[28]The plaintiffs may build on these common law entitlements through the application of paragraph 17 of the building agreement. Among other things paragraph 17 provides that the builder's mortgage secures to the plaintiffs their interest in the vessel while under construction and in "all material, equipment, inventory, and other goods created, manufactured, ordered, or delivered for the Vessel, commencing with the identification of each such item to the Vessel or this Agreement". I would again emphasize that the terms of the order allowing movement of the vessel, work on the vessel, delivering up to the plaintiffs of fittings, equipment and appurtenances not yet incorporated in the vessel and delivery to the sheriff of parts and equipment ordered for the vessel, but not yet received, are permissive, in

order to accommodate the nature of an arrest. The order specifically provides for liberty to apply for further necessary orders and directions. All of this is in keeping with the concept that an arrest and the placing of a sheriff in possession are procedural and do not create any new legal vested rights in anyone.

CONCLUSION

[29]Disputes between vessel owners and shipbuilders are invariably complex matters which, if litigated, lead to extremely complicated and lengthy proceedings.

[30]In this instance completion of the *Chairman* by Sovereign is clearly not an option. Thus the present objective is two-fold. The plaintiffs, as mortgagees who went into possession and wished to have the use of their vessel as soon as possible should, at their own risk and initial expense, have the ability to complete the *Chairman* elsewhere. Sovereign, which has lost the opportunity to complete the vessel, must be fully secured and that will be accomplished by bonding before the *Chairman* is released from arrest and leaves the jurisdiction. This may not be a completely satisfactory solution for either side, however it will give the parties the opportunity to work toward a negotiated resolution, without either needlessly tying up the substantial investment which the plaintiffs have in the *Chairman*, or running up more than a minimum claim for loss of use.

[31]These objectives are met, without compromising anyone's substantive rights, through the arrest of the *Chairman* by the plaintiffs as mortgagees in possession, the placing the sheriff in possession and permitting the movement of the arrested vessel, together with parts and equipment intended for the vessel, to a new shipbuilder. Costs shall be in the cause.