CITATION: Roynat Inc. v. Phoenix Sun Shipping Inc., 2013 ONSC 7308
COURT FILE NO.: CV-13-10028-00CL
DATE: 20131126

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: Roynat Inc., Applicant

AND:

Phoenix Sun Shipping Inc., Respondent

BEFORE: D. M. Brown J.

COUNSEL: K. Mahar, for the Receiver, Grant Thornton Limited

W. Sharpe, for Roynat Inc.

M. Isaacs, for a creditor, Laurentian Pilotage Authority

HEARD: November 25, 2013

REASONS FOR DECISION

I. Receiver's motion to approve the sale of a ship which is subject to *in rem* proceedings in the Federal Court

[1] Periodically concurrent proceedings by creditors against a ship, or the proceeds realized from the sale of a ship, are commenced in a provincial superior court and the Federal Court of Canada. Such has happened in the present case in respect of the ship now known as the "Phoenix Sun", which is owned by the respondent debtor, Phoenix Sun Shipping Inc.

[2] Briefly, proceedings were commenced in the Federal Court by two creditors of Phoenix Sun Shipping (Federal Court file T-314-13) which resulted in a warrant to arrest the Phoenix Sun on February 18, 2013. At the time the Ship was docked in Sorel, Quebec, where it remains.

[3] Roynat Inc. enjoys a first charge on all of the assets of the Debtor and a marine mortgage registered against the Ship. In mid-February of this year the Debtor invited Roynat to appoint a receiver over its property. On February 28 the Debtor informed Roynat about the arrest of the Ship under the Federal Court's process. On March 11, 2013 Roynat moved before this Court for the appointment of a receiver over the property of the Debtor, and that day Morawetz J. issued a standard Commercial List receiver's appointment order (the "Appointment Order"). Grant Thornton Limited was appointed receiver.

[4] On April 8, 2013, Roynat moved before the Federal Court for an order appointing Grant Thornton as Acting Admiralty Marshall for the Ship. Russell J. granted the order which included

extensive terms regarding the sale of the Ship and the treatment of the sale proceeds (the "Federal Court Order").

[5] Fast forward to yesterday, November 25, when the Receiver moved before this Court for an order approving a November 14, 2013 agreement to sell the Ship and directions regarding the disposition of the proceeds of sale. The sale agreement for which the Receiver sought approval has a closing date of today, November 26. Yesterday I disposed of the motion as follows:

> This motion, as it related to the sale approval request, use of sale proceeds and approval of most of Grant Thornton's work in respect of the ship was misconceived and should not have been brought in this court, as I will explain in written reasons to follow.
>
> Any relief regarding sale approval (if required) and the treatment of sale proceeds should be brought in the Federal Court. Once the Receiver is in a position to clarify the dollar and cents items which only this Court has jurisdiction to consider, it can reappear before me at a 9:30 to seek further directions. Confidential Appendix 1 to be sealed. No costs.

These Reasons explain how I reached that result.

II. Key facts

[6] As mentioned, the Commercial List Appointment Order made on March 11, 2013 followed the form of this Court's model appointment order. Paragraph 3(l) granted the Receiver the power to sell the Debtor's property without the approval of this Court for any transaction not exceeding $50,000 and "with the approval of this Court in respect of any transaction in which the purchase price…exceeds [$50,000]".

[7] No further order has been made by this Court. Specifically, the Receiver did not ask this Court to approve a sales and marketing process.

[8] Nor did Roynat then go back to the Federal Court to seek a stay of those *in rem* proceedings. Instead, Roynat obtained the Federal Court Order on April 8, 2013. Under that order Russell J.:

(i) Granted Roynat judgment as first registered ship mortgagee under the *Canada Shipping Act*;

(ii) Appointed Grant Thornton as Acting Admiralty Marshall "for the purpose of conducting the sale of the Defendant Ship 'Phoenix Sun'";

(iii) Ordered the Ship to be "sold for the benefit of persons asserting an interest in or claim or judgment against that Defendant Ship, subject to the terms of this Order";

(iv) Ordered the Ship to be sold "where it now lies at Sorel Quebec…free and clear of any claims and encumbrances under Canadian Maritime Law";

(v) Directed that Grant Thornton, as the Acting Admiralty Marshall "shall continue in possession of the Defendant Ship 'Phoenix Sun' until the completion of performance

of any sale and the payment of proceeds of sale into Court, subject to further order of this Court";

(vi) Issued a Commission of Sale for the Ship to Grant Thornton, as Acting Admiralty Marshall, which directed Grant Thornton "to cause the ship 'Phoenix Sun' be sold by private sale for the highest price that can be obtained for it" and, further, directed Grant Thornton "as soon as the sale has been completed, to pay the proceeds thereof into Court and to file an account of the sale signed by you, together with this Commission";

(vii) Established a claims bar process for any claims against the Ship;

(viii) Ordered that "the fees, expenses and disbursements of the Acting Admiralty Marshall in taking possession of the 'Phoenix Sun' in maintaining and insuring that Defendant Ship and of acting under this Order and the Commission of Sale shall be costs incident to the sale of the Defendant Ship 'Phoenix Sun'";

(ix) Ordered Grant Thornton, as Acting Admiralty Marshall, to "pay the proceeds of sale, if any, of the Defendant Ship 'Phoenix Sun' into court to abide the determination of entitlement to proceeds of sale and order of payment out";

(x) Stipulated that the proceeds of sale are subject to the Receiver's Charge granted by this Court's Appointment Order and to the Administration Charge granted by this Court in 2012 in *Companies' Creditors Arrangement Act* proceedings against the Ship's previous owner; and,

(xi) Specified that "directions for the further procedure for determination of claims against the Defendant Ship 'Phoenix Sun' and the order of payment out from any proceeds of sale are reserved until further order of this Court…"

As can be seen, this was a most extensive order concerning the sale of the Ship, the review of claims against the Ship and the use of any sale proceeds.

[9] The Receiver's materials on yesterday's motion before this Court contained a First Report of the Receiver which reviewed, in a comprehensive way, the efforts undertaken by the Receiver/Acting Admiralty Marshall to sell the ship, the resulting offers and the agreement of purchase and sale proposed for approval by the Receiver/Acting Admiralty Marshall. The Receiver filed the quality of materials one would expect to see when a court-appointed officer seeks to meet the principles set out in *Royal Bank of Canada v. Soundair.*[1]

---

[1] (1991), 4 O.R. (3d) 1 (C.A.).

[10] The main relief sought by the Receiver in this Court fell into the following categories:

(i) Approval of the proposed sale of the Ship;

(ii) Authorization to use the sale proceeds for several purposes: (i) payment of the *CCAA* Administration Charge, (ii) payment of the Receiver's approved fees and disbursements, (iii) payment of the borrowing under the Receiver's Certificate, (iv) payment of an amount to the Monitor of the *CCAA* proceedings pending the settlement of an issue in that proceedings, and (v) payment of any remaining sale proceeds into the Federal Court; and,

(iii) Discharge of the Receiver.

[11] While most of the relief sought by the Receiver is the common sort seen in receivership proceedings in this Court, on the facts of this case I was faced with the reality that Russell J., at the request of the major secured creditor, Roynat, had made the very extensive Federal Court Order, as a result of which the orders of this Court and that of the Federal Court conflicted in three key respects:

(i) The Approval Order required the approval of this Court for a sale transaction at a price greater than $50,000, whereas the Federal Court Order issued a Commission of Sale directing a "private sale for the highest price that can be obtained" for the Ship;

(ii) The standard stay of proceedings contained in the Approval Order extended to any "rights and remedies against…or affecting the Property", and one could view the sale authorization provisions of the Federal Court Order as conflicting with that stay; and,

(iii) Paragraph 12 of the Approval Order required that all funds collected by the Receiver from any source, including the sale of the Property, were to be placed in a receiver's account "to be paid in accordance with the terms of this Order or any further Order of this Court", whereas the Federal Court Order directed that the sale proceeds be paid into that court awaiting its direction for distribution.

III. Analysis

[12] Section 22(1) of the *Federal Court Act*, R.S.C. 1985, c. F-7 provides that the Federal Court enjoys "concurrent original jurisdiction, between subject and subject as well as otherwise, in all cases in which a claim for relief is made or a remedy is sought under or by virtue of Canadian maritime law…" This Court enjoys jurisdiction over property and insolvency, including proceedings to realize on maritime property granted to secure indebtedness.[2]

[13] Notwithstanding the overlap of jurisdiction between this Court and the Federal Court in maritime law matters, as a practical matter when a creditor seeks to enforce its security against

---

[2] See generally, *Halsbury's Laws of Canada, First Edition, 2012, Maritime*, §HMT-2.

maritime property such as a ship, it must take great care in ensuring that it sets up a process in which one domestic court will have primary carriage of the realization proceedings. Part XIII of the *Bankruptcy and Insolvency Act* creates such a co-ordinated process for cross-border insolvencies. So, too, parties should act to create an informal "main proceeding" in domestic cases involving maritime property so that, at the end of the day, the administration costs associated with court proceedings are kept to a minimum and the amount of money available for distribution of creditors is not reduced by unnecessary costs resulting from multiple proceedings in provincial superior and federal courts.

[14] Unfortunately, in the present case Roynat sought and obtained orders from this Court and the Federal Court which created practical, operational conflicts between the two processes, thereby risking increasing administration costs to the detriment of all creditors.

[15] The Receiver and Roynat sought to smooth over those conflicts by providing, in the first form of draft order submitted for my review, that any funds which I might order to be paid to the Receiver or Monitor from the sale proceeds would be "subject to confirmation of the Federal Court". With respect, such an approach does not work. Just as a judge of the Superior Court of Justice of Ontario lacks the jurisdiction to consider and confirm an order of a judge of the Federal Court, so, too, it is not open to a judge of the Federal Court to confirm the act of a judge of this Court. Both are courts of original jurisdiction; neither is inferior to the other.

[16] After a break, the parties then proposed a form of order under which I would order the payment of certain amounts out of the sale proceeds, and then direct the Receiver to pay any remaining funds into the Federal Court, but that approach would bump up against the clear directions of Russell J. to pay the sale proceeds into the Federal Court, leaving it to that court to direct how they should be paid out. I appreciate the efforts of counsel to find a "work around" to the problem, but the problem really stemmed from the conflicting orders obtained by Roynat. Consequently, I think any solution must be found by going back to first principles.

[17] As the Supreme Court of Canada pointed out in the case of *Antwerp Bulkcarriers, N.V. (Re)*,[3] once the maritime jurisdiction of the Federal Court is engaged by the commencement of an *in rem* action and the arrest of a vessel, that jurisdiction is not lost by reason of the subsequent commencement of proceedings under the *BIA*:[4]

> The Ship having been 'captured' by the processes of the Federal Court, neither it nor the proceeds of its sale was available to be sent back to Belgium by a Canadian bankruptcy court.[5]

And to drive that point home, the Supreme Court of Canada added:

---

[3] [2001] 3 S.C.R. 951.
[4] *Ibid.*, para. 40.
[5] *Ibid.*, para. 47.

> Had the bankruptcy occurred in Canada instead of Belgium on April 5, 1996, the Quebec Superior Court would have had no authority to command the Federal Court to stay the proper discharge of its maritime law jurisdiction.[6]

[18] Now, legitimate reasons no doubt may exist to commence receivership or insolvency proceedings in a provincial superior court notwithstanding the existence of maritime law proceedings in the Federal Court. That will depend upon the specific facts of a case and the nature of the claims asserted against the debtor's property, including a vessel.

[19] But, as I read the decision of the Supreme Court of Canada in *Antwerp Bulkcarriers*, *in rem* proceedings having been commenced in the Federal Court, this Court should proceed with care in any subsequent proceedings commenced before it and pay due regard, or deference, to the Federal Court proceedings.

[20] In the present case, *in rem* proceedings concerning the Ship were started in the Federal Court before the receivership proceedings in this Court. Roynat, having obtained the appointment of a Receiver in this Court, then went back to the Federal Court not to stay the *in rem* proceedings, but to seek what can only be described as a very comprehensive sales process and claims bar order. Indeed, the initial claims bar order in the Federal Court was tweaked by a later order made by Hughes J. of that court on June 19, 2013.

[21] Given the extensive directions made by the Federal Court concerning the sale of the Ship, the use of the proceeds from that sale and the creation of a claims bar order, I conclude that it would not be appropriate for this Court to exercise any of its jurisdiction under the Appointment Order regarding the sale of the Ship or the use of the sale proceeds. Having sought in the first instance extensive directions from the Federal Court, in my view Roynat and the Receiver/Acting Admiralty Marshall should return to the Federal Court to seek any approvals which may be required for the proposed sale and the payment out of sale proceeds. It was for that reason that yesterday I declined to exercise this Court's jurisdiction to grant the orders sought by the Receiver and, instead, deferred to the jurisdiction of the Federal Court in the *in rem* proceedings.

[22] Although the borrowings of the Receiver are secured by a first charge created by the Approval Order, the amount of those borrowings is readily ascertainable, and I have no doubt that the Federal Court will give due recognition to the priority granted to those borrowings by this Court.

[23] I recognize that the Receiver seeks approval of its activities as Receiver, as well as its fees and disbursements. However, it is clear that most of the work performed and fees incurred by the Receiver were done in its capacity as Acting Admiralty Marshall. Indeed, the memorandum of agreement for the proposed sale transaction specified that Grant Thornton was acting "in its capacity as Acting Admiralty Marshall under the Commission of Sale in the Federal Court Action T-314-13". Accordingly, Grant Thornton should first seek approval of its

---

[6] *Ibid.*, para. 55.

fees and disbursements as Acting Admiralty Marshall from the Federal Court. If there then remains any claim for fees and disbursements incurred by it solely in its capacity as Receiver appointed by this Court, they can be submitted for my consideration, as well as a renewed request for its discharge as Receiver.

D. M. Brown J.

Date: November 26, 2013