

Federal Court



Cour fédérale

Date: 20190712

Docket: T-1227-17

Citation: 2019 FC 926

Ottawa, Ontario, July 12, 2019

PRESENT: Madam Prothonotary Mireille Tabib

BETWEEN:

**THE ADMINISTRATOR OF THE
SHIP-SOURCE OIL POLLUTION FUND**

Plaintiff

and

**M.V. MATTERHORN LIMITED,
GERARD THOMAS DUNPHY,
MILLER SHIPPING LTD.,
PATRICK MILLER JR.,
and
THE OWNERS AND ALL OTHERS INTERESTED
IN THE SHIP “MATTERHORN”**

Defendants

ORDER AND REASONS

[1] The following reasons set out facts underlying the present action as well as the legal regime applicable to them, as they have been agreed by the Parties. These reasons also set out the

circumstances in which the Parties came to seek the issuance of these reasons and of the resulting order.

[2] On August 10, 2014, the Matterhorn (“Vessel”) sank at her moorings at a facility in Mount Carmel, Newfoundland and Labrador, causing a pollution incident. After the initial sinking, oil was noted to have formed a sheen around the Vessel’s location, however the Vessel continued to emit pollution intermittently over the course of several years (“Pollution Incident”). As a result of the Pollution Incident, the Canadian Coast Guard (“CCG”) ultimately found it necessary to engage contractors to remove pollutants from the Vessel in July and August of 2016.

[3] Following the steps taken by the CCG to remedy the situation, the CCG filed a claim for compensation with the Administrator of the Ship-source Oil Pollution Fund. The Administrator evaluated the CCG’s claim and compensated the CCG for costs and expenses deemed incurred to respond to the Pollution Incident in the amount of \$181,208.40. The Administrator then became subrogated into the rights of the CCG pursuant to section 106(3)(c) of the *Marine Liability Act*, SC 2001, c 6 (“Act”) and commenced the present action.

I. THE FACTS

[4] The circumstances giving rise to this action are set out below. The facts as recited appear mostly from the pleadings, although they have been supplemented with details and explanations from documents in the record, the contents of which have been agreed to by the parties.

[5] The Plaintiff is the Administrator of the Ship-source Oil Pollution Fund (“Administrator”), appointed pursuant to section 94 of the Act. The Ship-source Oil Pollution Fund (“SOPF”) was established to compensate those who have claims for oil pollution damage or anticipated damage caused by the discharge of oil from all classes of ships in inland or coastal waters.

[6] Once compensation is paid to a claimant, the Administrator is obliged under section 106(3)(d) of the Act to take all reasonable measures to recover that payment from the shipowner or any other responsible party. Canada has adopted the polluter-pays principle and it is part of the Administrator’s statutory mandate to act in accordance with this principle.

[7] The Vessel at issue is a tug that was built in 1957 in Saint John, New Brunswick. She is almost 48 metres long, and her gross tonnage is 535. The Vessel was purchased by Secunda Marine Services in 1994. Unfortunately, the Vessel suffered a broken tailshaft. She was laid up for years, until a legal battle over the insurance was resolved, prior to being partially repaired in 2006. Despite the repairs, her controllable pitch propeller was still not operational, and she was put up for sale.

[8] In 2009, the Vessel was purchased and renamed Matterhorn. She was initially towed to the facility in Mount Carmel, but was subsequently towed to Marystown, where she remained laid up for several years. Prior to the Pollution Incident, she was towed back to the facility in Mount Carmel, where she eventually sank at her moorings.

[9] There are a number of entities and individuals who were involved with the Vessel in the years following her sale in 2009. M.V. Matterhorn Limited (“Matterhorn Ltd.”) is a company registered in Newfoundland and Labrador that was incorporated on February 26, 2009. As at November 13, 2018, the Newfoundland and Labrador Registry of Companies lists Matterhorn Ltd. as not in good standing.

[10] On or around August 26, 2009, Matterhorn Ltd. was identified as the registered owner of the Vessel in the Canadian Register of Vessels. On July 29, 2014, the Vessel’s registration was suspended. Arctic Offshore International Inc., a related company, was listed as the Manager of the Vessel.

[11] Mr. Gerard Thomas Dunphy (“Mr. Dunphy”) is the sole director of Matterhorn Ltd. Mr. Dunphy has also been involved in other, now defunct, shipping related entities, including Arctic Offshore International Inc., who was the manager of the Vessel.

[12] Mr. Dunphy is the director of four other companies listed in the Newfoundland and Labrador Registry of Companies, namely Arctic Lift 1 Limited, Arctic Petroleum Solutions Inc., Arctic Offshore International Inc., and North Atlantic Ship Brokers Ltd. As at August 4, 2017, and continuing to this day, all the aforementioned companies are listed as not in good standing, and have their registered offices, which are listed as inactive, in the same building.

[13] Mr. Patrick Miller Jr. (“Mr. Miller”) has also been involved in at least two of the defunct entities, Arctic Lift 1 Limited and Matterhorn Ltd. In 2008, Arctic Lift 1 Limited was

incorporated, and Mr. Dunphy and Mr. Miller were listed as the two current directors. The barge Arctic Lift I (“Barge”), at the time of the Pollution Incident, was adjacent to the Vessel.

[14] While Mr. Miller admits having had an interest in Matterhorn Ltd., he divested himself of that interest in 2011, prior to the Pollution Incident.

[15] Miller Shipping Ltd. (“Miller Shipping”) is a company registered in Newfoundland and Labrador that was incorporated on February 2, 1988. As at November 13, 2018, the Newfoundland and Labrador Registry of Companies lists Miller Shipping as in good standing. At all material times, Mr. Miller was the sole director of Miller Shipping.

[16] It is Miller Shipping that owns and operates the ship repair facility located at Mount Carmel, Newfoundland and Labrador (“Mount Carmel Facility”) at which the Vessel was located when it sank.

[17] Mr. Dunphy contracted with Miller Shipping to tow the Vessel to the Mount Carmel Facility. While the Defendants agree that Miller Shipping was authorized to remove fuel from the Vessel as part of their agreement, they disagree on how much fuel was to be removed from the Vessel. Ultimately, the towage was completed and the Vessel was tied up at the Mount Carmel Facility on July 17, 2014, and several thousand litres of fuel oil and lube oil remained on board the Vessel after she was delivered to the Mount Carmel Facility.

[18] On August 10, 2014, the Vessel developed a list and sank at her moorings at the Mount Carmel Facility. At the time of her sinking, the Vessel was not in service, nor had she been in service since Matterhorn Ltd. acquired her. When she sank, the Vessel was located between a tug named the Hudson Bay Explorer and the Barge. The Vessel was tied alongside the outboard, starboard, side of Hudson Bay Explorer. The Barge was lying perpendicularly off the starboard side of the Vessel.

[19] At the time of the sinking, a sheen of pollution was detected extending several hundred feet from the Vessel. An officer of the CCG attended onsite to assess the situation. At that time, the CCG was informed that the Vessel did not have insurance in place, nor was there an arrangement in place with a pollution response organization.

[20] On August 10, 2014, the CCG spoke with Mr. Dunphy concerning the pollution, and instructed him to address the pollution situation. However, on the following day, no booms had been put in place to prevent further pollution. On August 11, 2014, the CCG also spoke with Mr. Miller and again with Mr. Dunphy and provided instructions on how to boom the Vessel.

[21] On August 11, 2014, the CCG issued a Notice under Section 180 of the Canada Shipping Act 2001 ("S. 180 Notice"), directing Mr. Dunphy to deal with the ongoing pollution incident.

[22] On August 12, 2014, several sections of damaged solid boom had been deployed, but there were no absorbent boom or ballast chains. Mr. Miller confirmed to the CCG that he was the one who had deployed the boom. The Miller Defendants' workers replaced a damaged section of

the boom. On that same day, the CCG called Mr. Dunphy and outlined the deficiencies in the response. During this time, oil pollution continued to escape from the Vessel into the surrounding waters.

[23] On August 13, 2014, the CCG held an onsite meeting with Mr. Dunphy, who was provided with instructions to contain the pollution, and absorbent material to commence cleaning part of the area affected by the incident. The next day, on August 14, 2014, an absorbent boom was installed. After that date, all attempts by the CCG to contact Mr. Dunphy and Matterhorn Ltd. (“Matterhorn Defendants”) went unanswered and were unsuccessful.

[24] Several weeks later, in early September 2014, during a site visit, the CCG observed that the existing booms had ceased to be effective to contain the pollution. The area outside of the booms was again becoming contaminated with oil pollution. At this point, the CCG took steps to properly boom the site.

[25] From the time of the sinking of the Vessel until mid-July 2016, approximately two years, the CCG continued to monitor and secure the site. During that time, instances of oil pollution outside the boom were nevertheless reported. After August 2014, none of the Defendants took any steps to contain or remedy the ongoing pollution damage.

[26] After approximately a year, the CCG renewed its efforts to contact the registered owner of the Vessel. In July and August 2015, Mr. Dunphy failed to return the CCG’s calls and messages and avoided being served with a S. 180 Notice. In July, the CCG ran advertisements in

the local newspaper providing notice of the S. 180 Notice and urging the Matterhorn Defendants to contact it. No reply was received. In September 2015, Mr. Dunphy failed to comply with a Direction Order of the CCG.

[27] Having failed to contact Mr. Dunphy, the CCG took a more active role in seeking to resolve the Pollution Incident. The CCG arranged for a dive assessment to be conducted on August 5, 2015, in order to preliminarily assess the oil remaining onboard the Vessel and to seek to prevent further pollution. The vents of the Vessel were sealed, and a drum that contained oil was removed from the deck. The CCG estimated on the basis of interviews with former crew and the dive assessment that there remained several thousand litres of oil on board.

[28] On June 9, 2016, the CCG engaged Sea-Force Diving Ltd. to locate and remove the oil from the submerged Vessel, under the supervision of the CCG. During the course of July 2016, approximately 5,000 litres of waste oil and 22,000 litres of waste water, being a mix of diesel, oil and water were removed from the Vessel and the site. By August 2, 2016, the CCG confirmed that no further fresh oil sheens were observed on the water. As a result, the containment boom was removed.

[29] By way of letter dated August 8, 2016, the CCG filed a claim for costs and expenses in relation to the Pollution Incident with the Administrator in the amount of \$172,751.64 (“CCG Claim”).

II. CLAIMS ASSESSMENT BY THE ADMINISTRATOR

[30] Pursuant to s. 103(1) of the Act, any person in Canada (other than a response organization), including corporations and the Crown, who has sustained loss or damage, or incurred costs and expenses, in respect of actual or anticipated oil pollution damage may file a claim directly with the Administrator of the SOPF.

[31] Pursuant to s. 105(1) of the Act, upon receipt of a claim, the Administrator shall investigate and assess it. The Administrator has a team comprised of, inter alia, local and regional marine experts and internal legal counsel, who assist the Administrator in her investigation and assessment of claims.

[32] The SOPF's purpose is to compensate claimants where their claim complies with the requirements of the Act. The assessment process, however, involves careful scrutiny of the claim by claims handlers with subject matter expertise. For the purpose of investigating and assessing a claim, the Administrator, and the team under her direction, have the powers of a commissioner under Part I of the Inquiries Act. The assessment process is based on the documentation submitted by the claimant, but also may include any further and independent investigation that the Administrator deems fit to perform.

[33] A claim, or a portion thereof, will generally be found to be established where the costs and expenses are determined to be reasonable, actually incurred, be in respect of actual or anticipated oil pollution damage, and be in respect of reasonable measures. Once investigated and assessed, the Administrator is required to make an offer of compensation to the claimant for whatever portion of the claim that the Administrator finds to be established.

[34] If the claimant accepts the Administrator's offer of compensation, then the Administrator compensates the claimant for the portion of the claim that has been established, and is subrogated into all of the claimant's rights in relation to the incident to the extent of the payment.

[35] The Administrator, along with members of her team, investigated and assessed the CCG's Claim. The costs and expenses claimed were in respect of response and monitoring measures, the dive assessment and the removal of the oil pollution. The Administrator determined that the amount of \$172,751.64 was established. Once interest was added pursuant to s. 116 of the Act, the CCG was compensated in the amount of \$181,208.40 on February 23, 2017. As a result, the Administrator became subrogated into the rights of the CCG in relation to the Pollution Incident.

[36] Once the Administrator is subrogated into the rights of the claimant, pursuant to s. 106(3)(d), the Administrator "shall take all reasonable measures to recover the amount of the payment from the owner of the ship, the International Fund, the Supplementary Fund or any other person liable...".

III. THE FEDERAL COURT PROCEEDINGS

[37] Although the Administrator demanded that the Defendants pay the amount of the CCG Claim to the Administrator, the Defendants declined to do so. The Administrator commenced these proceedings on August 8, 2017.

[38] The Administrator alleged that the Defendants were jointly liable for the costs and expenses incurred by the CCG in respect of the monitoring and measures taken to prevent, repair, remedy and minimize the damage caused the Pollution Incident. The Defendants denied responsibility.

[39] After the pleadings had closed, the Parties agreed to mediate in order to explore whether an amicable resolution to the proceedings was possible. The undersigned presided over a mediation held in Halifax on November 28, 2018.

[40] The mediation eventually resulted in an agreement between the parties to resolve the dispute. Although most of the terms of the settlement agreement are confidential, the Parties consented, as part of the resolution, to seek from the Court a consent order with reasons setting out the uncontested facts underlying this dispute and the legal regime which they agree apply to those facts. All Parties agreed that enabling the circumstances and facts surrounding the Pollution Incident to become part of reported reasons for order is beneficial and valuable to the Administrator, as it will permit the Administrator to use this case in her education and outreach efforts.

[41] The Court has been provided with an executed copy of the minutes of settlement and the mutual release, and agrees that it is in the public interest for the detailed consent order agreed to between the Parties to be issued in the particular circumstances of this case.

ORDER

THIS COURT ORDERS that:

1. This action be, and it is hereby, discontinued without costs.

“Mireille Tabib”

Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:

T-1227-17

STYLE OF CAUSE:

THE ADMINISTRATOR OF THE SHIP-SOURCE OIL
POLLUTION FUND v M.V. MATTERHORN LIMITED,
GERARD THOMAS DUNPHY, MILLER SHIPPING
LTD., PATRICK MILLER JR., AND, THE OWNERS
AND ALL OTHERS INTERESTED IN THE SHIP
"MATTERHORN"

ORDER AND REASONS:

TABIB P.

SOLICITORS OF RECORD:

Vanessa Rochester
Sofia Lopez-Bancalari
Norton Rose Fulbright LLP
Ottawa, ON

FOR THE PLAINTIFF

Eric Machum
Seamus Ryder
Metcalf & Company
Ottawa, ON

FOR THE DEFENDANT
MILLER SHIPPING LTD., PATRICK MILLER JR.,

Mathew G. Williams
Ritch Williams & Richards
Ottawa, ON

FOR THE DEFENDANT
MATTERHORN LIMITED, and
GERARD THOMAS DUNPHY