

Federal Court



Cour fédérale

Date: 20221220

Docket: T-601-22

Citation: 2022 FC 1766

Ottawa, Ontario, December 20, 2022

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

HAPAG-LLOYD AKTIENGESELLSCHAFT

Plaintiff

and

GOLDEN TRUST TRADING INC.

Defendant

JUDGMENT AND REASONS

[1] Hapag-Lloyd Aktiengesellschaft [Hapag-Lloyd] brought an action against Golden Trust Trading Inc. [Golden Trust] for demurrage and other fees incurred in relation with the carriage of containers from Vancouver to Bangkok. Golden Trust did not file a defence within the prescribed time limits and was denied an extension of time to do so. Hapag-Lloyd now seeks default judgment. Having reviewed the evidence, I am granting judgment in favour of Hapag-Lloyd in the amount of \$4,060,061.46, plus interest and costs.

I. Background

[2] Golden Trust contracted with Hapag-Lloyd Aktiengesellschaft [Hapag-Lloyd] for the carriage of containers filled with waste paper and plastic film from Vancouver to Bangkok, Thailand. The contract is evidenced by nine waybills issued by Hapag-Lloyd. The containers were all discharged during the spring of 2019.

[3] Due to a change in Thailand's environmental import standards, the contents of the containers could not be imported into that country. Hapag-Lloyd claims that the containers remained in the port unclaimed for 782 days until it was able to re-export 30 of the 33 containers. According to Hapag-Lloyd, the other three containers are still in Thailand and continue to incur costs.

[4] On January 26, 2021, Hapag-Lloyd sent a letter of demand to Golden Trust, stating that six shipments had remained in the port of Bangkok since 2019. It asked Golden Trust to take possession of the containers, failing which it would dispose of the cargo.

[5] On December 1, 2021, Hapag-Lloyd's solicitors sent a second letter of demand to Golden Trust. The letter stated that the consignee had failed to take possession of the containers and that Hapag-Lloyd's attempt to auction, salvage sell or re-export the containers had not been allowed by Thai customs, and that the contents had to be destroyed. Hapag-Lloyd thus claimed US\$3,122,411 in demurrage, terminal storage and destruction costs. The letter listed 27 containers, shipped pursuant to nine "bills of lading" (or, more accurately, waybills).

[6] On March 18, 2022, Hapag-Lloyd brought this action against Golden Trust, claiming US\$3,122,411 for demurrage, storage and re-export costs of 27 containers. As Golden Trust did not file a statement of defence within the prescribed time limit, Hapag-Lloyd filed a motion for default judgment. Golden Trust then sought an extension of time to file its defence. I denied Golden Trust's motion, mainly because Golden Trust failed to show that its defence had some merit and that it had a reasonable explanation for the delay: *Hapag-Lloyd Aktiengesellschaft v Golden Trust Trading Inc*, 2022 FC 1571.

[7] While reviewing Hapag-Lloyd's motion, I noticed a lack of clarity on certain issues. I directed Hapag-Lloyd to provide additional information or submissions. Hapag-Lloyd provided this additional information on November 30, 2022.

II. Applicable Law

[8] Rule 210 of the *Federal Courts Rules*, SOR/98-106, provides that the plaintiff may bring an *ex parte* motion for default judgment where the defendant has not filed a statement of defence within the prescribed time limit. Even though the defendant is in default, the plaintiff must prove its claim on a balance of probabilities by way of affidavit evidence: *NuWave Industries Inc v Trennen Industries Ltd*, 2020 FC 867 at paragraphs 16–21. While the judge must carefully review the evidence, it is not the judge's role to raise grounds of defence in the defendant's stead: *Trimble Solutions Corporation v Quantum Dynamics Inc*, 2021 FC 63 at paragraphs 35–37.

III. Analysis

[9] At the outset, I note that I am satisfied that the Federal Court has jurisdiction over this matter, for the reasons given in my decision regarding the extension of time. There is also no doubt that Golden Trust is in default.

[10] Before analyzing Hapag-Lloyd's evidence to ascertain whether it has proved its claim, I need to address the scope of the default judgment I am entitled to issue.

A. *Scope of Default Judgment*

[11] As a matter of principle, "a plaintiff seeking default judgment is limited to the relief claimed in the Statement of Claim": *Tag Heuer SA v Doe*, 2000 CanLII 14847 (FC) at paragraph 6. A defendant who chooses not to appear should know the extent of its exposure. It would be unfair to issue a judgment that the defendant could not have contemplated.

[12] Applying this principle in the present case raises certain difficulties. Hapag-Lloyd's pleadings contain inconsistent and inaccurate statements, in particular with respect to the precise number of containers involved. The amount claimed has increased over time. A close review of Hapag-Lloyd's materials reveals mistakes and inconsistencies. It is thus necessary to compare the statement of claim and Hapag-Lloyd's later filings.

[13] The statement of claim is for "damages of USD \$3,122,411.00 in capital, subject to adjustment," as well as interest and costs. Hapag-Lloyd alleges that it carried containers shipped

by Golden Trust according to nine non-negotiable waybills. It states that 23 containers were carried, but then provides a list containing 27 entries. (The same discrepancy was found in the December 2021 letter of demand.) It also states that only one container remained in Bangkok and still accumulated demurrage fees, all the others having been re-exported.

[14] In its motion for default judgment, Hapag-Lloyd claims US\$3,874,479.00. The claim now relates to 33 containers, 3 of which remain in Bangkok. The claim includes US\$3,439,422.00 with respect to the 30 containers that have been re-exported, and US\$435,057.00, as of the date of the motion, in demurrage and storage charges for the containers that remain in Bangkok.

[15] In its response to my questions, Hapag-Lloyd now indicates that there are 34 containers involved in this matter. This is a mistake: in the table provided, the rows are numbered from 1 to 34, but there is no row 33. Thus, Hapag-Lloyd is claiming in respect of 33 containers. It also provided four additional waybills that were not previously disclosed. Upon review, the six containers that were the subject of these new waybills were not included in the statement of claim and were added in the motion for default judgment. Contrary to what was previously stated, three of these containers were not re-exported, but their contents were auctioned. The evidence is now that four, not three, containers remain in Bangkok, awaiting a decision from Thai customs. One of these four containers is among those listed in the statement of claim. The claimed amount is now US\$3,934,040.

[16] What, then, is the permissible scope of this motion for default judgment? A practical approach is apposite, especially because the statement of claim itself noted that the amount claimed was “subject to adjustment,” and it was obvious that fees were still accruing with respect to at least one container. Thus, I am prepared to allow Hapag-Lloyd to provide additional evidence and to adjust the claimed amount, but only in respect of the containers mentioned in the statement of claim. In particular, the claimed amount may be adjusted to account for the fact that one container is still incurring demurrage fees.

[17] However, Hapag-Lloyd cannot seek default judgment in respect of containers or waybills not mentioned in its statement of claim. This would be an impermissible extension of the scope of the claim, which would require an amendment to the statement of claim. In the circumstances of this case, claiming for an additional container or pursuant to a different waybill is not a mere adjustment to the amount claimed. The little information I have about the context in which the containers were shipped and the discussions between the parties do not allow me to conclude that there is a single cause of action encompassing all the containers. I also note that an amount close to US\$1 million is claimed with respect to the six additional containers.

[18] I would add that it is not too much to ask a multinational corporation such as Hapag-Lloyd to be able to describe correctly and precisely what is at stake in a claim amounting to several million dollars. In any event, as the six additional containers are not the proper subject of this action, Hapag-Lloyd may bring a separate action if it wishes to do so.

B. *Review of the Evidence*

[19] This brings me to the proof of Hapag-Lloyd's claim.

[20] The claim is based on clause 20(2) of the Terms and Conditions of the waybills, which reads as follows:

(2) Merchant shall take delivery of the Goods within the time provided for in Carrier's applicable tariff.

- (a) If Merchant fails to do so, Merchant shall either nominate an alternative receiver or accept a return shipment or organize the cargo disposal, failing which Merchant shall indemnify Carrier for all losses arising out of Merchant's refusal to remedy the situation. Furthermore, Carrier shall be entitled, without notice, to unpack the Goods if packed in Containers and/or to store the Goods ashore, afloat, in the open or under cover, at the sole risk of Merchant. Such storage shall constitute due delivery hereunder, and thereupon the liability of Carrier in respect of the Goods stored as aforesaid shall wholly cease.
- (b) Merchant shall be responsible for the costs of such storage, as well as detention and demurrage.

[21] "Merchant" is defined in clause 1 as including the shipper, and Golden Trust is named as the shipper in the waybills.

[22] In his affidavit, Mr. Gregor Priesnitz, an employee of Hapag-Lloyd, states that Hapag-Lloyd carried the containers according to the waybills, but that Golden Trust failed to take delivery. Thus, the containers remained unclaimed in the port of Bangkok for a period of approximately two years before most of them could be re-exported. One container still remains in Bangkok.

[23] Hapag-Lloyd also provided its schedule of demurrage fees for Thailand, as well as invoices from the Bangkok port authority regarding storage and other fees. It also provided tables detailing the fees incurred with respect to each container.

[24] Based on this evidence, I am satisfied that Hapag-Lloyd has proved its claim on a balance of probabilities for demurrage fees and storage and re-export costs in respect of the 27 containers that were the subject of the statement of claim. After deducting the fees claimed in respect of the six additional containers that are not properly the subject of this motion, this amounts to US\$2,974,404.

C. *Currency*

[25] Hapag-Lloyd claims an amount in United States dollars. Yet, section 12 of the *Currency Act*, RSC 1985, c C-52, requires all references to money in judgments to be stated in Canadian currency. Thus, where a claim is made before our Court for the performance of a contractual obligation stated in a foreign currency, the amount must be converted into Canadian dollars. Where the cause of action occurs at a single point in time, the conversion is calculated at that moment, which is often called the “breach day”: *Kuehne + Nagel Ltd v Agrimax Ltd*, 2010 FC 1303 at paragraphs 19–23 [*Kuehne + Nagel*]. However, where the cause of action is continuous, the Court usually makes the conversion at the date of the judgment: *Dow Chemical Company v Nova Chemicals Corporation*, 2017 FC 350 at paragraphs 175–189, [2018] 2 FCR 154, affirmed by *Nova Chemicals Corporation v Dow Chemical Company*, 2020 FCA 141 at paragraphs 165–175, [2021] 1 FCR 551, affirmed on other grounds by 2022 SCC 43.

[26] In this case, the breach is continuous. It is therefore appropriate to use the exchange rate as of the date of this judgment, which is 1.365 Canadian dollars for one American dollar. The principal amount awarded will therefore be \$4,060,061.46.

D. *Interest*

[27] Hapag-Lloyd claims prejudgment interest from the date of the first letter of demand at a rate of 3.11%, compounded quarterly. The 3.11% rate represents the average Bank of Canada rate for the period since the letter of demand, plus a premium of 2%. Hapag-Lloyd also claims postjudgment interest at a rate of 5%, not compounded.

[28] I first note that subsection 36(7) of the *Federal Courts Act*, RSC 1985, c F-7, provides that the remainder of section 36 does not apply to maritime law cases. Interest in such cases is at the discretion of the Court: *Kuehne + Nagel*, at paragraph 24.

[29] I also note that compounded interest may be awarded, but that such an award “will generally be limited to breach of contract cases where there is evidence that the parties agreed, knew, or should have known, that the money which is the subject of the dispute would bear compound interest as damages”: *Bank of America Canada v Mutual Trust Co*, 2002 SCC 43 at paragraph 55, [2002] 2 SCR 601; *Apotex Inc v Eli Lilly and Company*, 2018 FCA 217 at paragraph 159. Hapag-Lloyd did not provide such evidence. Its standard terms and conditions make no mention of compound interest. Accordingly, I will not award compound interest.

[30] I agree with Hapag-Lloyd that a prejudgment interest rate of 3.11%, that is, 2% above the average Bank of Canada rate, is appropriate. Calculated since January 26, 2021, this amounts to \$239,736.06. Given the recent evolution of interest rates, I also agree that a 5% postjudgment rate is appropriate.

IV. Conclusion

[31] For these reasons, Hapag-Lloyd's motion for summary judgment is granted in part and judgment will issue against Golden Trust in the amount of \$4,299,797.52, plus interest at a rate of 5% from the date of this judgment. There is no reason to depart from the usual practice of awarding costs to the successful party.

JUDGMENT in T-601-22

THIS COURT'S JUDGMENT is that:

1. The plaintiff's motion for default judgment is granted in part.
2. The defendant is condemned to pay to the plaintiff the sum of \$4,299,797.52, plus interest from the date of this judgment at the rate of five percent *per annum*.
3. Costs are awarded to the plaintiff.

"Sébastien Grammond"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-601-22

STYLE OF CAUSE: HAPAG-LLOYD AKTIENGESELLSCHAFT v GOLDEN TRUST TRADING INC.

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO, PURSUANT TO RULE 369

JUDGMENT AND REASONS: GRAMMOND J.

DATED: DECEMBER 20, 2022

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