SG Air Leasing Limited v. Inchatsavane Company(Proprietary) Limited et al.[Indexed as: SG Air Leasing Ltd. v. Inchatsavane Company(Proprietary) Ltd.]

Ontario Reports

Court of Appeal for Ontario,

Simmons, Cronk and Blair JJ.A.

June 17, 2015

126 O.R. (3d) 454 | 2015 ONCA 440

Case Summary

Liens — Repairer's lien — Appellant not entitled to repairer's non-possessory lien under Repair and Storage Liens Act solely on basis that it advanced funds to finance cost of aircraft repairs by third parties — Repair and Storage Liens Act, R.S.O. 1990, c. R.25.

The appellant advanced funds to finance the cost of repairs by third parties to an aircraft owned by the respondent. It brought a motion for a declaration that it had a non-possessory lien under the *Repair and Storage Liens Act* in respect of the aircraft and for other relief. The motion was dismissed. The appellant appealed.

Held, the appeal should be dismissed.

The appellant did not carry out the repairs at issue. It did not bestow skill, labour or money on the aircraft, nor did it effect improvements to the aircraft. Thus, the appellant did not fall within the class of workers and artisans that s. 7 of the Act seeks to protect. The fact that it advanced funds to third parties to prepay or finance the costs of repairs to the aircraft did not alter that conclusion.

Cases referred to

858579 Ontario Inc. v. QAP Parking Enforcement Ltd. (1995), 22 O.R. (3d) 346, [1995] O.J. No. 517, 122 D.L.R. (4th) 314, 80 O.A.C. 241, 11 M.V.R. (3d) 91, 9 P.P.S.A.C. (2d) 1, 53 A.C.W.S. (3d) 886 (Div. Ct.) [page455]

Statutes referred to

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 6(2) [as am.]

Repair and Storage Liens Act, R.S.O. 1990, c. R.25, ss. 1(1), 7

APPEAL from the order of Dow J. of the Superior Court of Justice dated March 27, 2015 dismissing a motion for a declaration that the appellant had a lien.
Sean N. Zeitz and *Ian Klaiman*, for appellant.

Kenneth Prehogan and *Scott McGrath*, for respondent.

BY THE COURT: --

I. *Introduction*

[1] The appellant, SG Air Leasing Limited ("SG Air"), appeals from the motion judge's ruling dated March 27, 2015 dismissing its claims for: (i) a declaration that it has a non-possessory lien under the *Repair and Storage Liens Act*, R.S.O. 1990, c. R.25 (the "Act") in respect of a McDonnell Douglas Model DC-9-87 aircraft owned by the respondent, Inchatsavane Company (Proprietary) Limited ("ICPL"); (ii) a declaration that, at the time of the motion, SG Air was in lawful possession of the same aircraft; and (iii) an extension of an *ex parte* injunction obtained by SG Air by court order dated January 12, 2015 concerning the aircraft.

[2] As argued before this court, the focus of the appellant's attack on the dismissal order was narrowed. In brief, SG Air challenges the motion judge's interpretation of the Act, his refusal to grant continuing injunctive relief (although on an altered basis), his finding that SG Air's claim under the Act is statute-barred and his treatment of the costs associated with the storage of the aircraft.

[3] At the conclusion of oral argument by the appellant, we dismissed the appeal, with reasons to follow. These are those reasons.

II. *Discussion*

(1) *Preliminary observation*

[4] At the outset, we note that there were multiple irregularities in the manner in which these proceedings were constituted. These include, for example: the purported commencement by SG Air of an application -- an originating process -- without any claim for final relief; the bringing of a proceeding for final declaratory relief by way of motion before the motion judge (even when no declaratory relief was originally claimed); and an [page456] appeal to this court in which SG Air sought an extension of the interlocutory injunction previously obtained without first obtaining leave to appeal from the Divisional Court or an order under s. 6(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[5] However, ICPL did not raise any of these irregularities before the motion judge. Nor did it do so before this court. Instead, it elected to resist SG Air's motion below on the merits. In these circumstances, we will address the merits of the appeal from the motion judge's decision.

(2) *Lien claim*

[6] The motion judge held that SG Air is not entitled to a repairer's non-possessory lien in respect of the aircraft. We agree.

[7] Section 1(1) of the Act defines the word "repairer" as "a person who makes a repair on the understanding that the person will be paid for the repair". Under the same section, the word "repair" is defined for the purposes of the Act as follows:

> "repair" means an expenditure of money on, or the application of labour, skill or materials to, an article for the purpose of altering, improving or restoring its properties or maintaining its condition and includes,
>
> *(a)* the transportation of the article for purpose of making a repair,
>
> (*b*) the towing of an article,
> (*c*) the salvage of an article.

[8] It is undisputed that SG Air did not carry out the aircraft repairs in question. The respondents, Goderich Aircraft Inc. and New United Goderich Inc., effected the repairs. Moreover, on the uncontested findings of the motion judge, SG Air's lien claim rests solely on the fact that it loaned funds to the Goderich companies in 2011, allegedly to finance modifications and repairs to the aircraft after it had been sold by ICPL to a third party, Millers Capital Investments PTE Ltd.

[9] These facts are dispositive of SG Air's lien claim. SG Air did not carry out the repairs or modifications at issue. It did not bestow skill, labour or money on the aircraft. Nor did it effect improvements to the aircraft. Thus, SG Air

does not fall within the class of workers and artisans that s. 7 of the Act seeks to protect: see *858579 Ontario Inc. v. QAP Parking Enforcement Ltd.* (1995), 22 O.R. (3d) 346, [1995] O.J. No. 517 (Div. Ct.).

[10] The fact that SG Air furnished funds to the Goderich companies to prepay or finance the costs of repairs to the aircraft does not alter this conclusion. The Act does not extend a [page457] repairer's lien to lenders who merely lend money to repairers or storers. SG Air simply advanced funds for repairs to the aircraft that were carried out by a third party. Even if, as SG Air contends, the funds were advanced for the ultimate benefit and account of ICPL -- a matter not before this court for determination -- the fact remains that the funds in question were still a loan.

[11] In these circumstances, any expectation of repayment by SG Air, as required under the definition of "repairer" under the Act, relates to repayment of the funds advanced or lent to the Goderich companies, rather than to repayment of funds expended by SG Air "on" the aircraft, as contemplated by the statutory definition of "repair" under the Act. It follows that SG Air cannot claim a non-possessory lien in respect of the aircraft. Given this conclusion, we do not reach SG Air's other grounds of appeal regarding the motion judge's lien claim ruling.

(3) *Claim for injunctive relief*

[12] To the extent that SG Air continues to challenge the motion judge's denial of further injunctive relief, we see no merit to this challenge. SG Air has not established that it is a "repairer" within the meaning of the Act, with the result that it is not entitled to a possessory or non-possessory lien under the Act. As a result, any claim for continued or fresh injunctive relief is based solely on SG Air's alleged status as an unpaid creditor of ICPL. There was nothing before the motion judge, and there is nothing before this court, establishing that SG Air will be unable to sue ICPL on any alleged debt owing to it by ICPL or that it will be unable to enforce any judgment it might obtain against ICPL. The fact that the alleged debt is said to be owed by a foreign corporation does not entitle SG Air to prejudgment injunctive relief in a simple debt action.

(4) *Storage charges*

[13] We also reject SG Air's attack on the motion judge's ruling that it must pay, from the sum of $350,000 held in trust by SG Air's Ontario solicitors (the "SG Air Trust Funds"), the Goderich companies' unpaid storage charges concerning the aircraft. The court was informed, in this regard, that SG Air in fact has paid the storage charges in question. In essence, therefore, it seeks a determination that it is not liable for the charges at issue and, presumably, that it should be reimbursed for same by ICPL.

[14] We disagree. The SG Air Trust Funds constitute security provided by SG Air for ICPL's costs of this litigation and in [page458] respect of SG Air's undertaking as to damages. They were provided to SG Air's solicitors pursuant to the order of Weiler J.A. of this court, dated April 14, 2015.

[15] The storage charges were incurred because SG Air, through its injunctive proceedings, prevented ICPL, the lawful owner of the aircraft, from removing the aircraft from Ontario. The storage charges, therefore, represent a direct expense that falls within SG Air's undertaking as to damages.

[16] We see no basis to disturb the motion judge's ruling on this issue.

(5) *Ancillary orders*

[17] The parties seek various ancillary orders.

[18] First, by agreement of the parties, incorporated on consent into Weiler J.A.'s order dated April 14, 2015, the aircraft was released into ICPL's possession and removed from this jurisdiction after ICPL's Ontario solicitors (Weir Foulds LLP) were provided with a letter of credit in the amount of US$3.5 million. Under para. 5 of Weiler J.A.'s order, the letter of credit was to be held by ICPL's solicitors pending further order of the court or agreement of the parties.

[19] In light of the disposition of this appeal, ICPL now seeks court approval of the release of the letter of credit. SG Air, for its part, requests that the letter of credit continue to be held by ICPL's Ontario solicitors, until expiry of the time allowed for SG Air to seek leave to appeal from this judgment to the Supreme Court of Canada.

[20] In our view, no prejudice to ICPL having been advanced, it is appropriate that Weir Foulds LLP continue to hold the letter of credit, and not release or otherwise deal with it, until expiry of the time allowed for SG Air to seek

leave to appeal from this judgment to the Supreme Court of Canada, should SG Air elect to seek leave. We so order.

[21] Second, in respect of the SG Air Trust Funds held by SG Air's Ontario solicitors pursuant to para. 8 of Weiler J.A.'s order, dated April 14, 2015, ICPL requests that costs of this appeal be awarded to it, that those costs be paid forthwith from the SG Air Trust Funds, and that its costs of the motion below, as awarded by the motion judge as against SG Air ($94,048.77), also be paid forthwith from the SG Air Trust Funds.

[22] In our view, ICPL is entitled to its costs of the appeal, fixed in the amount of $11,540.62, inclusive of disbursements and all applicable taxes. Those costs, together with ICPL's costs below in the sum of $94,048.77, as awarded by the motion judge [page459] as against SG Air, shall be paid from the SG Air Trust Funds forthwith if SG Air fails to file a notice for leave to appeal from this judgment to the Supreme Court of Canada within the applicable time period for leave to that court. The balance of the SG Air Trust Funds shall be held by SG Air's Ontario solicitors pending adjudication by the Superior Court of Justice of ICPL's entitlement to damages as against SG Air for the detention of the aircraft in Ontario, or other court order.

[23] Finally, ICPL seeks its costs of the motions before Weiler J.A., which were reserved to the panel hearing this appeal. ICPL is entitled to its costs of those motions, fixed in the amount of $21,791.04, payable on a joint and several basis by the parties opposite on those motions (including SG Air) from the SG Air Trust Funds on the basis described and in accordance with para. 22, above.

III. *Disposition*

[24] The appeal is dismissed in accordance with these reasons.

Appeal dismissed.