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Canadian Transport Lawyers Association - AGM & Educational Conference 2018

Montreal, Quebec

October 27, 2018

Panel Presentation:

Reviewing Recent Cargo Cases

The following is prepared as part of a panel presentation reviewing recent cargo cases. In addition to involving cargo, the cases below also share a common theme – invoking certain procedures to dispose of claims before the conclusion of trial. While summary judgment motions may represent the most commonly-known method of disposing of a matter prior to trial, only one of these cases involved a summary judgment motion. In two other cases, the claims were struck due to the Federal Court's lack of jurisdiction. Finally, a recent cargo decision presents as a rare example of a motion for non-suit.

1. Limits to the Federal Court's Jurisdiction

Certain Underwriters at Lloyd's and Soline Trading Ltd. v. Mediterranean Shipping Company S.A.[1] involved a motion to dismiss a third-party claim on the basis that the claim disclosed no reasonable cause of action over which the Federal Court had jurisdiction. The central issue was whether the activities underlying the third-party claim were sufficiently connected to Canadian maritime law, so as to fall within the scope of the Federal Court's jurisdiction pursuant to section 22(1) of the *Federal Courts Act*[2].

The Federal Court is a court lacking inherent jurisdiction. It has concurrent jurisdiction over certain claims against the Crown, and exclusive jurisdiction for certain claims against the Attorney General of Canada, or for relief against a federal board, commission or other tribunal. It also has express jurisdiction concerning "navigation and shipping" by virtue of section 22 of the *Federal Courts Act*. Therefore, if a matter comes within this section of the *Federal Courts Act* (i.e. navigation and shipping generally or the enumerated categories of s. 22(2)), the Federal Court can have jurisdiction. If the matter does not fall within Canadian maritime law, the Federal Court lacks jurisdiction.

In this case, the plaintiff contracted with the defendant to move a cargo of frozen shrimp from a port in Ecuador to the port of Montreal. The defendant was a carrier offering transportation of goods by sea. Once the cargo arrived in Montreal, the container sat in a container yard awaiting pickup.

At that point, a numbered company doing business as Trans Salonikios, entered the picture. Trans Salonikios was a trucking company that had somehow acquired

[1] 2017 FC 460 (CanLII).
[2] RSC 1985, c. F-7.

release codes for this cargo. Trans Salonikios picked up the cargo at the terminal yard, and the goods were not seen afterwards. The plaintiff sued the defendant Mediterranean Shipping Company ("MSC") as carrier for wrongful delivery of the cargo.

MSC defended by asserting that the carriage contract ended once the cargo was discharged at the terminal. MSC also third partied Trans Salonikios on the basis that Trans Salonikios be held liable to it, should the plaintiff succeed in obtaining a damage award against MSC.

Trans Salonikios brought its motion to dismiss the third-party claim on the basis that the Federal Court had no jurisdiction over the third-party claim, as the matter did not fall within the Court's jurisdiction over Canadian maritime law. Trans Salonikios contended that its involvement could only be as a trucker taking a container from a terminal yard. Conversely, MSC alleged that Trans Salonikios was sufficiently linked to the marine adventure because of its relationship with the marine terminal.[3] MSC attempted to tie the "navigation and shipping"-related operations of a marine terminal to the transport activities conducted by Trans Salonikios. MSC essentially argued that the transport of goods by sea to a marine terminal is interwoven with the subsequent transport of goods by land away from the marine terminal.

However, Prothonotary Mireille Tabib rejected MSC's theory. The Court concluded that the cause of action against Trans Salonikios solely arose from its actions as a trucker (or perhaps as an alleged thief). The mere fact that the object of the theft were goods recently carried by sea did not bring Trans Salonikios' own actions within the field of Canadian maritime law. In the reasons, the Court cited earlier cases of *Matsuura Machine Corp. v. Hapag Lloyd AG*, *Sio Export Trading Co. v. The "Dart Europe"*, and *Marley Co. v. Cast North America (1983) Inc.*[4], which all suggested that a land carrier's transport roles are not so "integrally connected to maritime matters as to be legitimate Canadian Maritime Law within federal legislative competence."

The third-party claim could not be saved on a theory of judicial economy either; this notion of judicial economy – on a theory of similar fact – would not serve to cloak the

[3] MSC based its assertion on the case *ITO - International Terminal Operators v Miida Electronics Inc.*, 1986 CanLII 91 (SCC), [1986] 1 SCR 752.
[4] [1997] FCJ No. 360, [1984] 1 FC 256 and [1995] FCJ No 489, respectively

Federal Court with jurisdiction over a land actor, being the transport company, that it never held.

MSC appealed the prothonotary's decision. Mr. Justice LeBlanc heard the appeal and upheld the earlier result. The essence of the claim against Trans Salonikios was that of trucker, or thief. The relation to a marine terminal was too tenuous to bring the matter within Canadian maritime law. MSC conceded that its claim against Trans Salonikios did not fall within one of the classes of claims listed within subsection 22(2) of the Act. And Justice LeBlanc did not accept that the facts of this claim or, perhaps more generally, that the nature of transport companies interacting with port terminals, warranted an expansion of "Canadian maritime law" as defined in section 2(1).

In the decision, Justice LeBlanc commented on:

- the Federal Court of Appeal's standard of review applicable to discretionary orders made by prothonotaries;
- the statutorily-defined authority proscribed to the Federal Court;
- the test to determine whether the Federal Court has jurisdiction over a subject matter;
- the balance between matters that are in 'pith and substance' of local concern (involving property and civil rights or other matters within exclusive provincial jurisdiction) or whether a claim's subject matter is so integrally connected to maritime matters as to legitimately be a subject of Canadian maritime law (and thus within federal competence);
- factors that could enhance the maritime nature of the case, including proximity of the operation to the sea, the connection between the activities and the contract of carriage by sea; and
- the importance of a uniform legal regime pertaining to navigation and shipping in light of the intrinsically multi-jurisdictional nature of maritime matters.

Ultimately, Justice LeBlanc wrote "…the integration of the logistics between a terminal operator and a trucker, as is the case here according to MSC, does not bring the matter of the trucker's activities within federal jurisdiction."

The next case is that of *Elroumi v. Shenzhen Top China Imp & Exp Co., Ltd China*[5]. The plaintiff received damaged goods after shipping them from China to Montreal. The goods travelled by sea from China to Vancouver, by rail to Montreal and then by Entropot Canchi's truck from the train terminal to the plaintiff's residence. The plaintiff learned the goods were damaged after clearing customs. She sued the vendors/shippers, the insurer, the transport agent and the land storage and transportation company but did not name the ocean carriers.

Entropot Canchi, as the land carrier, third partied the ocean carrier, and then both moved to dismiss claims against them on the basis that the Federal Court lacked jurisdiction, and specifically that the Federal Court lacked jurisdiction of the plaintiff's claim against the land carrier, Entropot Canchi.

The Court acknowledged that the through bills of lading covered the adventure from the port of loading in China to the port of discharge, in Montreal, and so the Court's jurisdiction would have included claims involving those parties. But the Court ruled that the fact that the ocean carriers were responsible for the segment covered by the bills of lading does not extend the jurisdiction of the Federal Court over claims against parties to other contracts of carriage, such as the land carrier, Entropot Canchi. The claims against Entropot Canchi and the third party were both struck.

2. Evidentiary Woes in Summary Judgment

The next case started as a coverage case, *Broadgrain Commodities Inc. v. Continental Casualty Company*[6], and was resolved using a summary judgment procedure.

The insured, Broadgrain, sought coverage for 26 containers of sesame seeds after the seeds were found to have been damaged. The seeds were in transit from October 15, 2014 to December 17, 2017 between Nigeria and China. Broadgrain contracted with its client Beidahuang for the sale. The contract was C.I.F.[7] and so involved Broadgrain purchasing insurance for Beidahuang with title passing to Beidahuang upon payment. Beidahuang paid the Broadgrain for the goods on December 12, 2014. The timing of the damage was undetermined. Upon arrival in China, the goods were unfit for consumption, sold for salvage and Beidahuang kept the salvage proceeds.

[5] 2018 FC 633.
[6] 2017 ONSC 4721 (CanLII)
[7] Cost, Insurance and Freight

The insurer paid damage for two of the containers but denied coverage for the remainder. The insurer denied on the basis that the cause of damage was "condensation and/or sweat," which was not a "transit related fortuity" and thus not an insured risk under the insurance policy. Broadgrain commenced an action by statement of claim to recover.

The insurer brought a summary judgement motion asserting two grounds: (i) Broadgrain did not have an "insurable interest" in the goods at the time of the loss; and (ii) Broadgrain did not sustain any loss since, despite the damage to the goods, it was paid in full by the Buyer for the shipment in question.

The Court first considered the threshold elements of summary judgment motions. It then acknowledged "there are certain areas of disagreement with respect to the facts, the record before me is largely undisputed." The Court added further that the "The motion largely turns on the proper interpretation of key provisions in the contract, considered in the context of the Canadian *Marine Insurance Act* (the "*CMIA*"), and certain undisputed facts."

The Court then found Broadgrain had an insurable interest in the shipped goods. On this issue, the Court addressed a fulsome "interpretation of key provisions in the contract, considered in the context of the Canadian *Marine Insurance Act"* and concluded that Broadgrain had an insurable interest.

However, the Court granted the insurer's summary judgment on the basis that Broadgrain did not sustain any loss, given that it was indisputably paid in full by Beidahuang for this shipment. Broadgrain had filed affidavit evidence asserting that after the loss Beidahuang had shorted other payments to Broadgrain to make up for the loss.

The Court refused to accept what it deemed Broadgrain's "bald assertions" on the shorting of other payments. The Court did not outline how the assertion of the shorted payments was at all challenged. Yet, it concluded Broadgrain had not delivered sufficient evidence to demonstrate the shorting. The Court wrote:

> "No explanation has been provided as to why similar documentary evidence was not available in respect of the other shipments where Broadgrain claims to have been short-paid. The absence of any supporting detail or documentation means that I can give little or no weight to the self-serving assertion in Ms. Cruz's affidavit."

Broadgrain appealed and attempted to introduce fresh evidence. Before the Court of Appeal[8], the primary issue was whether Broadgrain could introduce fresh evidence and the status of evidence appears to have turned against the appellant.

A secondary issue was the insurer's cross appeal and whether Broadgrain actually had an insurable interest (and so whether it had the right to advance the coverage claim against the insurer). The Court of Appeal upheld the earlier decision, and so did not need to address the insurable interest issue.

This presents a somewhat cautionary tale concerning summary judgment. The case reminds us that with a summary judgment motion, a court may be framed by a strict evidentiary record. What may be apparent to the parties and seemingly continues unchallenged (i.e. that a loss occurred, and short payments ensued) does not necessarily come across that way to a Court on a limited evidentiary record.

Reminders from the Court of Appeal include:

- the parties are expected to put their best foot forward and the court will assume that all necessary evidence has been tendered;
- the motion judge is entitled to presume that the evidentiary record is complete and there will be nothing further if the issue were to go to trial; and
- the motion judge is not required to resort to the summary judgment enhanced powers to remedy a party's evidentiary shortcomings.

Stepping back, the allegations suggest that Broadgrain was shorted future payments, and in that manner, it may have suffered a commercial loss directly attributable to this incident. It also had insured this load on its own behalf as well as on the behalf of its client. Thus, that may suffice to address and conclude the insurable interest point. The result is that the insurer was aware of an insured loss but avoided payment because of a limited evidentiary record at summary judgment. The judgment did not address the issue of the original coverage denial that was derived from an exclusion.

3. Evidentiary Woes at Trial

[8] 2018 ONCA 438 (CanLII).

The last case is *Harvestone Inc. v. Park Towing*[9]. This is a case from the Superior Court of Ontario, in Hamilton. It also presents as a shortcoming of evidence.

This action involved a load of stone within a shipping container. The plaintiff packed the container using its own support and securement. One defendant then used a crane to load the stowed container onto the other defendant's flatbed truck. The container was then moved to another location and offloaded from the truck. When the container was opened, the stone was broken and the plaintiff brought a claim in negligence, and sought damages for the alleged value of the stone.

The matter proceeded to trial and the essence of the plaintiff's claim was that the resulting damage was itself proof of negligence. However, there was no evidence of any accident or incident while on route. Once the plaintiff presented its claim and closed its case, the defendant carrier moved for non-suit. The Court refused to accept that the fact of damage demonstrated negligence, or *res ipsa loquitur.* The motion for non-suit was granted.

4. In Closing

In conclusion, the cases above demonstrate effective means to close out actions by challenges to the Federal Court's jurisdiction, by summary judgment, or by motion for non-suit. In each instance, had pleadings or evidence been developed differently, the outcomes arguably may have been different. As they stand, the cases caution practitioners to ensure that pleadings are fulsome, and that evidence is thoroughly considered and advanced on any potentially contentious issue.

[9] 2018 ONSC 5006.