THE NAVIGATOR

IN THIS ISSUE

MEMBER OF GLOBALAW THE INTERNATIONAL LAW GROUP

Jurisdiction Clauses in Bills of Lading Update

The recent decision of the Federal Court of Appeal in *Great White Fleet v. Arc-En-Ciel Produce Inc.* 2021 FCA 70 ("*Great White Fleet*") demonstrates the interplay between section 46 of the *Marine Liability Act* (SC 2001, c 6) ("MLA") and section 50 of the *Federal Court Act,* R.S.C. 1985, c. F-7 ("FCA") in respect of choice of jurisdiction clauses.

In order to protect Canadian shippers from the high cost and inconvenience of having to litigate cargo claims in a foreign forum stipulated by choice of jurisdiction clauses contained in bills of lading, in 2001 the Canadian Parliament enacted legislation that aimed to nullify the binding effect of choice of jurisdiction clauses. Section 46(1) of the MLA permits a party to a contract of carriage by sea to commence legal proceedings in Canada despite the presence of a choice of jurisdiction clause stipulating a foreign forum, provided that the party establishes one of three minimal connections to Canada. The section was also designed to remove the court's discretion to stay an action solely on the grounds that the parties have selected an exclusive forum outside Canada.

In *OT Africa Line Ltd. v. Magic Sportswear Corp.* 2006 FCA 284 the Federal Court of Appeal decided that notwithstanding section 46, the cargo loss claim in that case ought to be resolved in the English High Court and not in a Canadian Court. This was the first case weakening the applicability of section 46. Since 2006 the Federal Court of Canada has eroded the aim of section 46 and essentially brought the analysis to one on the merit of Canada as the forum for a dispute. In *Mazda Canada Inc. v. The Cougar Ace* 2008 FCA 219 the Federal Court of Appeal noted that section 46 of the *Marine Liability Act* allows a Canadian plaintiff to sue in Canada despite an exclusive jurisdiction in the relevant contract. However, subsection 46(1) does not grant Canadian courts jurisdiction; it only allows them to consider whether Canada is the most appropriate forum. The onus is on the defendant to convince the court on the balance of probabilities that jurisdiction in the forum chosen by the plaintiff should be declined on the basis that it is inappropriate compared to another obviously superior jurisdiction.

FIRM AND INDUSTRY NEWS

- The **United States Maritime Law Association** Spring 2021 Meetings and Annual Dinner will take place in New York on May 4-7, 2021.

- The **Toronto Commercial Arbitration Society** Annual General Meeting will take place on May 27th, 2021 in Toronto. **Rui Fernandes** and **Kim Stoll** will be attending.

- The **Canadian Board of Marine Underwriters** Spring Conference will take place on May 27th, 2021 virtually.

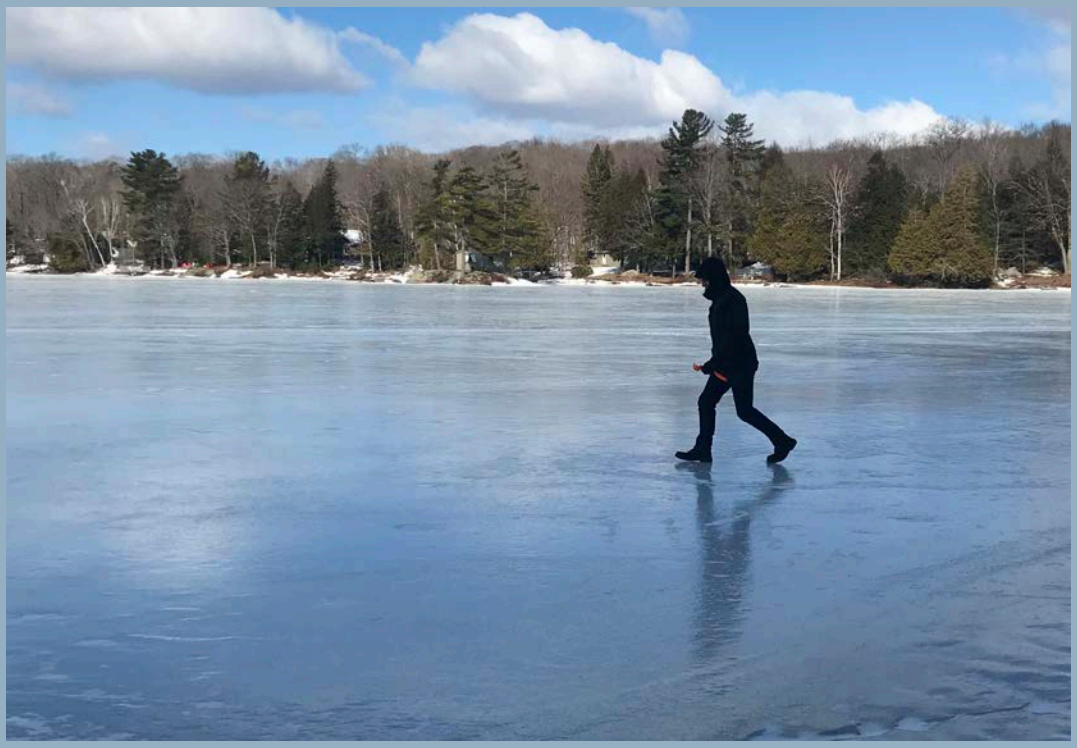
- The **Canadian Maritime Law Association** Annual General Meeting and Seminar will take place June 7-8, 2021 in Ottawa. **Rui Fernandes** as Central Region VP is organizing the Seminar.

- The **Transportation Lawyers Association** Annual Conference **/ Canadian Transport Lawyers Association** Midyear Meeting will take place in Lake Tahoe California June 23-26, 2021. **Gordon Hearn** will be chairing an "International Transportation Law Update" panel. **Kim Stoll** will be in attendance.

- The **International Conference on Admiralty and Maritime Law** will take place July 12-13, 2021 in Ottawa, Ontario.

- The **International Maritime Law Seminar** will take place October 28, 2021 in London England.

- Mark your calendars. The next **Fernandes Hearn LLP Annual Seminar** will take place on February 10, 2022. Send us an email to info@fhllp.ca to let us know what topics you would like us to cover.



In the *Great White Fleet* decision the Federal Court of Appeal reviewed the principles enunciated in earlier cases. The facts in *Great White Fleet* contain a twist not found in the previous arguments. The background facts may be briefly stated.

Arc-En-Ciel commenced an action against Great White Fleet ("GWF") in the Federal Court seeking damages allegedly sustained to a cargo of perishables shipped from Costa Rica to Etobicoke, Ontario. The contract or bill of lading between GWF and Arc-En-Ciel contained a forum selection clause specifying that any proceedings arising from the contract were to be commenced in the United States District Court, Southern District of New York and determined according to the laws of the United States.

GWF brought a motion under subsection 50(1) of the FCA to stay Arc-En-Ciel's action on the basis of that forum selection clause. In response, Arc-En-Ciel contended that section 46 of the MLA rendered the forum selection clause ineffective and permitted the action to proceed in Canada.

Section 46 of the MLA provides:

> 46 (1) If a contract for the carriage of goods by water to which the Hamburg Rules do not apply provides for the adjudication or arbitration of claims arising under the contract in a place other than Canada, a claimant may institute judicial or arbitral proceedings in a court or arbitral tribunal in Canada that would be competent to determine the claim if the contract had referred the claim to Canada, where
>
> (a) the actual port of loading or discharge, or the intended port of loading or discharge under the contract, is in Canada;
>
> (b) the person against whom the claim is made resides or has a place of business, branch or agency in Canada; or
>
> (c) the contract was made in Canada.

The Federal Court found that GWF had an agent in Canada, with the result that paragraph 46(1) (*b*) of the MLA was triggered and permitted the litigation to proceed in Canada. GWF had argued that the contract was not a "carriage of goods by water" within the meaning of section 46. GWF argued that the carriage was subject to a Service Contract which incorporated an Express Release Bill of Lading with a US jurisdiction clause. GWL argued that the Express Release Bill of Lading was not an "ordinary" bill of lading as it was not negotiable and was unsigned so it did not trigger section 46, being a twist from the usual analysis.

The Federal Court refused to stay the action in Canada. Even though the trial judge found that contract was a "contract of carriage by water" within the meaning of section 46, she also found that it was "premature" to make this finding and that the question whether section 46 was engaged was best left to the trial judge.

It should be noted that where section 46 is not engaged, the analysis and burden on a forum selection clause is different. The proper test for a stay of proceedings pursuant to section 50 of the *Federal Court Act* to enforce a forum selection clause in a bill of lading is the "strong cause" test. If section 46 does not apply and there is a foreign jurisdiction clause, a stay of proceedings must be granted unless the plaintiff can demonstrate a strong cause that it would not be reasonable of just to require the plaintiff to adhere to the forum selection clause (per the Supreme Court of Canada in *Z.I. Pompey Industrie v. ECU-Line NV*, 2003 SCC 27).

The Federal of Appeal noted a number of errors in the trial decision. At the trial level, the judge concluded that Arc-En-Ciel's action would be barred under a limitation provision under American law. Although GWF offered to refrain from arguing the limitation defence, the Federal Court stated that there was no evidence that

counsel's "offer" would be binding on the United States District Court. Therefore, "[u]pon the basis of the evidence submitted, the arguments advanced, and the relevant law, including jurisprudence", the Federal Court concluded Arc-En-Ciel had shown a "strong cause" for the Court to exercise its discretion to deny the motion for a stay. The Federal Court of Appeal noted that this was the main reason for the "strong cause" finding and that the trial judge failed to address the considerations set out in *(The) (Cargo Owners) c. "Eleftheria" (The)*, [1970] P. 94, [1969] 1 Lloyd's Rep. 237 at 242 (Adm. Div.), which include cost and convenience, and prejudice. Nor did the Federal Court assess the evidence in light of the recognized legal and evidentiary burdens resting on Arc-En-Ciel.

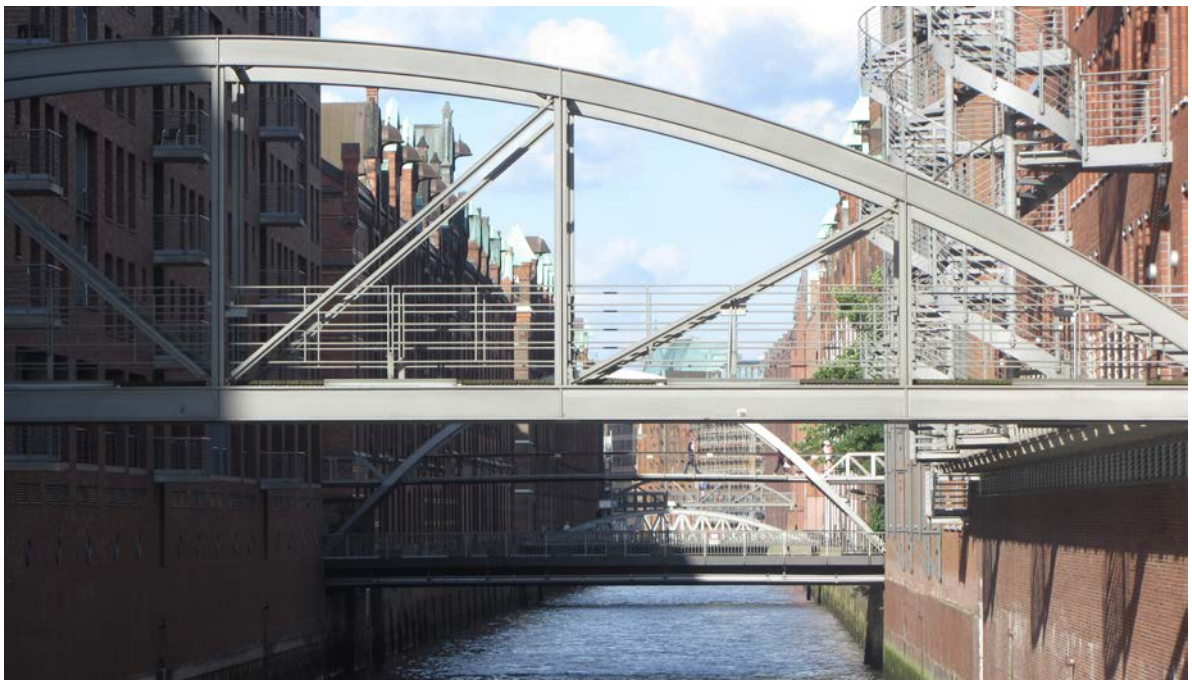
The Federal Court of Appeal also noted that the trial judge's reasons did not explain why the prejudice associated with the limitation period was not addressed by GWF's undertaking to not pursue that defence, other than to say that the undertaking would not be binding on the American court. "While I share the Federal Court's concern about the enforceability in an American court of an oral undertaking given in the course of argument, the reasons, alone, amount to conjecture and do not, again, reflect that the legal obligation to establish prejudice rested with the plaintiff." (para. 16).

The Federal Court of Appeal also criticized the trial judge for not dealing with section 46 on the stay application stating (at para. 12):

> Leaving this question to the trial judge defeats one of the purposes of section 46, which is to bring certainty to questions of jurisdiction. Forcing the parties to spend the time and money preparing for a trial which the Federal Court, in the end, may determine it should not hear, does not advance the objective expressed by Rule 3 of the *Federal Courts Rules*, S.O.R./98-106, of ensuring "[the] most expeditious and least expensive determination of every proceeding on its merits."

The Federal Court of Appeal ordered that the matter be sent back to the trial division (to a different judge) for determination of the applicability of subsection 46(1) stating that, if subsection 46(1) applies to the contract(s) in issue, the *forum non conveniens* test then applies. If section 46 does not apply, the Federal Court could then consider, if necessary, the argument that there is strong cause to refuse to enforce the forum selection clause.

Rui Fernandes



2. Wrongful Dismissal in the Time of COVID-19.

…Two Recent Cases

While the number of civil trials has been dramatically reduced due to the pandemic, summary judgment motions continue to be an option for the final determination of certain disputes, in particular, in wrongful dismissal actions where the key issue is the quantum of damages to which a dismissed employee is entitled. Where appropriate, a summary judgment motion, in which the evidence tendered is set out in affidavits and transcripts of the cross-examinations on those affidavits (versus "live" witness testimony in a trial) can finally dispose of a court action. Two recent wrongful dismissal cases, in which "just cause" for termination was not an issue, were determined by way of summary judgment.

In *Marazzato v. Dell Canada Inc.* ("*Marazzoto*") (*1) the Court was asked to determine the amount of damages Mr. Marazzato was entitled to after his employment was terminated, without cause, after 14 years of service. At the time of termination, on March 4, 2020, Mr. Marazzato was 59 years of age and held the position of Senior Manager Director of Sales. Nine employees reported to him. He was compensated by way of a base salary of $189,000 and was eligible for a sales target incentive ("STI") that was worth over $231,000 in 2019, a long-term incentive ("LTI") that paid restricted stock units which were to vest on March 15, 2021 with a value of $21,147.39, RRSP matching, a monthly car allowance of $600, and group benefits. His average income over the previous 3 years was $465,000. At the time of the summary judgment motion, in December 2020, Mr. Marazzato had not found a new job, and the employer did not dispute his mitigation efforts. The employer had provided Mr. Marazzato with his *Employment Standards Act, 2000* entitlements to 2 weeks of working notice, 8 weeks of statutory notice and 14.2 weeks of statutory severance pay (total of 24.2 weeks, or slightly less than 6 months).

In assessing the applicable common law notice, the Court relied on the Supreme Court of Canada ("SCC") case of *Bardal v. Globe and Mail* (*2) (hereinafter "*Bardal*") which sets out the four factors that a court must consider in determining common law notice: age, length of service, character of employment/position held and the availability of similar employment having regard to the employee's experience, training and qualifications. In addition to considering these 4 factors, Mr. Marazzato asked the Court to also consider the economic downturn due to COVID-19, which would make it harder to find a new job. The Court said that without evidence to support this statement, it would not be appropriate to speculate about the pandemic's impact on finding new work and therefore did not consider it when assessing the quantum of reasonable notice. The Court held that Mr. Marazzato was entitled to a notice period of 18 months (to September 4, 2021).

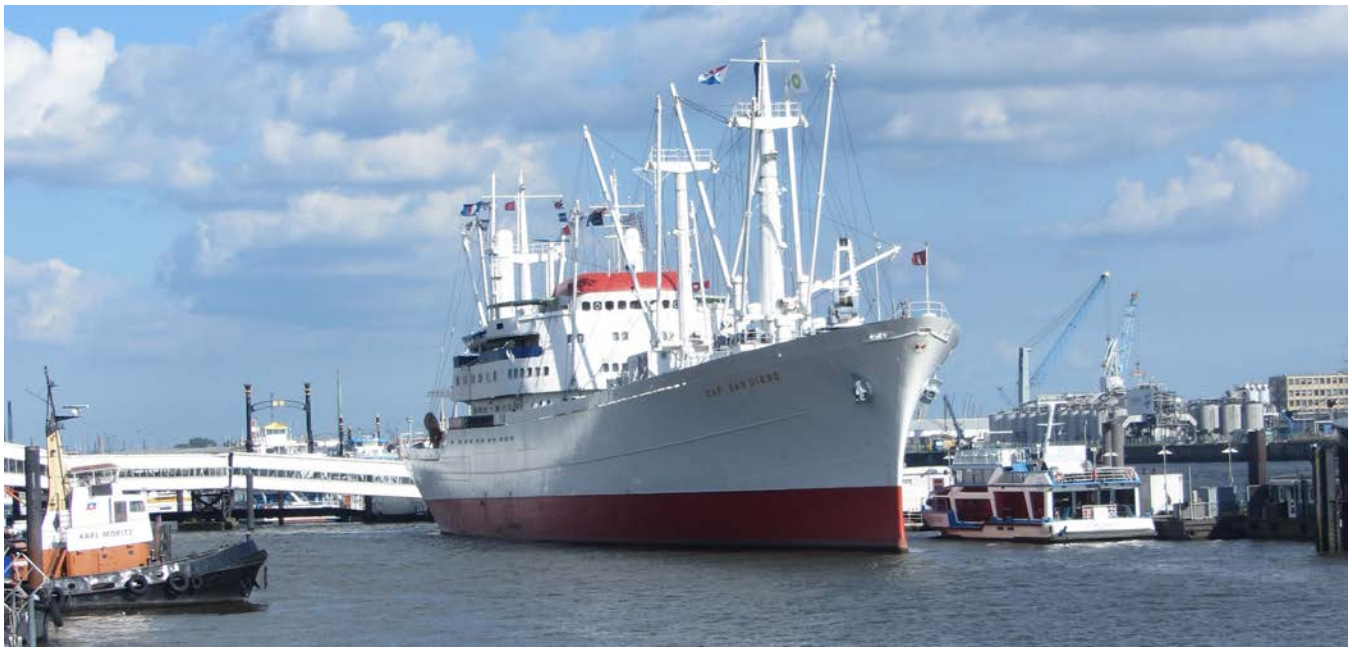
The Court then turned to a consideration of the amount of damages and, in particular, whether, in addition to base salary, the STI and LTI incentive payments and other benefits should be included. The Court's starting point was the recent SCC decision in *Matthews v. Ocean Nutrition* (*3) and the principle that damages in a wrongful dismissal claim are based on compensation for income, benefits and bonus that an employee would have received had the employer not breached the implied term of the employment contract to provide reasonable notice. The first step: considering the terms of the applicable incentive plan, is the employee entitled to the bonus/incentive during the reasonable notice period (in this case 18 months)? In Mr. Marazzato's case, had he continued to be employed to the end of the reasonable notice period, he would have been eligible for the incentive payments and benefits. The second step is to consider whether the terms of the employment contract "unambiguously" exclude the payment post termination.

In this case, the contract provided that that the incentive be paid only if the criteria were met

on or before the employee's "last day worked". The Court stated that this condition was not sufficient to oust the incentive payment because the terms of the contract did not include unambiguous language that address the common law notice period. With respect to stock, it vested during the common law notice period; however, the terms of that incentive plan provided that the stock was "not to be used for calculating any severance, resignation, redundancy, end of service payments, bonus, long-service awards, pension or retirement benefits or similar payments, and [employee] waives any claims on such basis". The Court held that this language was sufficiently unambiguous to exclude the stock from Mr. Marazzato's damages.

The Court then considered the fact that the summary judgment motion was delivered in January 2021, before the end of the reasonable notice period (ending on September 4, 2021) and in light of this, how the damage award should be structured. Because there was no issue with the employee's mitigation efforts, and no concern that the employee would not continue with his mitigation efforts, the Court imposed a "trust and accounting approach" whereby Mr. Marazzato would receive the amount awarded but a trust in favour of the employer was imposed on the judgment funds for the balance of the notice period that required Mr. Marazzato to account for any mitigation earnings, which would then reduce the amount of the common law award.

Nahum v. Honeycomb Hospitality Inc. (*4) is another decision rendered following a summary judgment motion in which the common law notice period was assessed in circumstances where the dismissed employee was pregnant at the time of termination. Ms. Nahum's employment as a mid-level manager whose employment was terminated after 4.5 months of employment, at which time she was 28 years old and approximately 5 months pregnant. She was terminated before COVID-19, on October 19, 2019 and her baby boy was born in February 2020. Ms. Nahum searched for work before her baby was born and, after a 2-month break following his birth, continued to search but, by the time of the summary judgment motion on February 10, 2021, she was still unemployed.



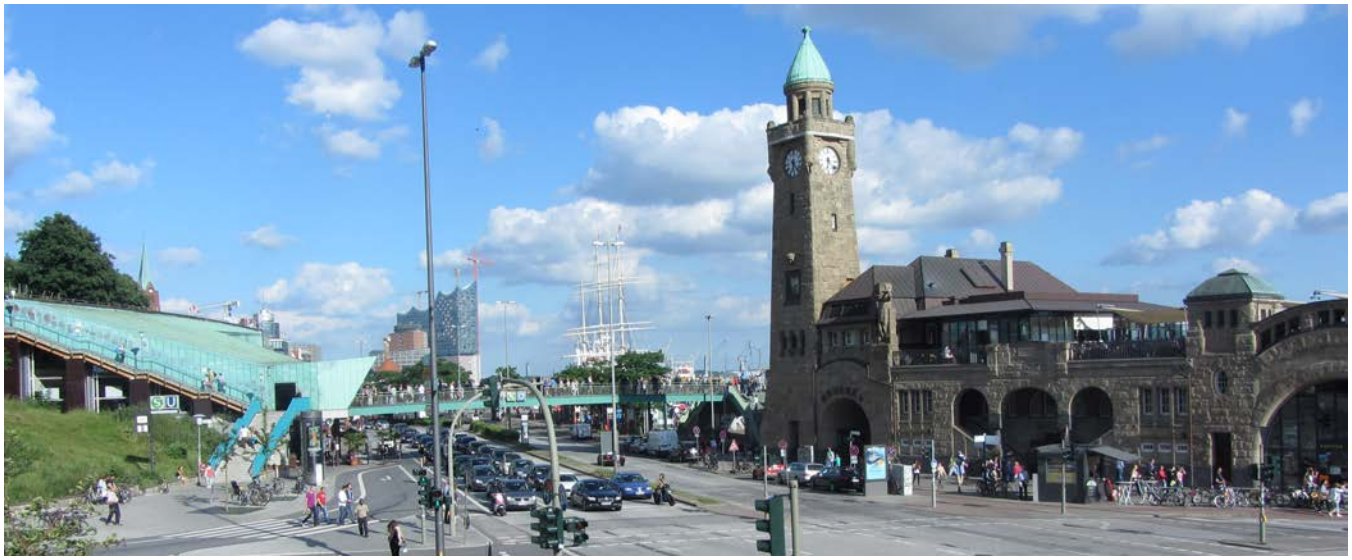
In assessing the reasonable notice period, the Court considered the *Bardal* factors (age, length of service, character of position held and availability of similar employment); however, Ms. Nahum asked the Court to also consider the fact of her pregnancy at the time of termination. What is interesting in this case is the parties agreed that COVID-19 was not a factor that the Court should consider when assessing reasonable notice because Ms. Nahum was terminated before the pandemic. The employer argued that in order to conclude that pregnancy would be a disadvantage in a job search, there needed to be evidence of same. The Court referred to the purpose of reasonable notice which is to provide a reasonable period of time to find a new position and that, objectively, pregnancy is likely to increase the amount of time it will take because most employers want to fill a need in their organization and so are looking for someone able to be present to do so. The Court also considered other cases which concluded, without evidence, that pregnancy creates difficulties with finding a new job. A Court can take judicial notice of a fact, where it is so notorious or generally accepted as not to be the subject of debate amongst reasonable persons. In this case the Court took "judicial notice" of the fact that pregnancy creates difficulties with finding a new job and so did not require any evidence on point. Notwithstanding this, the Court agreed with the employer that pregnancy should not automatically lengthen the notice period in every case – like all of the factors that go into assessing reasonable notice, pregnancy is but one to be considered.

In all of the circumstances, the Court held that Ms. Nahum's pregnancy was an important factor, along with her senior position and brief length of service and awarded her 5 months of notice.

It is clear that the *Bardal* factors are key to assessing reasonable notice. If an employee wants the Court to also consider COVID-19 as a factor, they may need to lead evidence of the impact of the pandemic on the availability of work, while the Court may take judicial notice of a pregnancy at the time of dismissal. The *Marazzato* case is also a reminder that any bonus or incentive plan must include clear and unambiguous wording with respect to what happens to the payment of these forms of compensation when employment ends; without such clear language, the employee will be entitled to these payments.

Carole McAfee Wallace

Endnotes
(*1) 2021 ONSC 248 (CanLII)
(*2) [1960] O.W.N. 253 (Ont. H.C.)
(*3) 2020 SCC 26
(*4) 2021 ONSC 1455 (CanLII)



3. The Domino Effect of the Suez Canal Saga – Part 1

In March 2021, Egypt's Suez Canal—one of the most important global trading routes—was blocked for nearly a week after the for the *EVER GIVEN*, a massive container ship boasting a length of 400 meters, became wedged across the water way. Some 350 plus ships including oil tankers, containers and vessels carrying billions of dollars' worth of cargo to consumers had been stuck in the canal, resulting in mass delays and billions of dollars in losses and expenses.

Impacting one of the world's busiest trade routes, the canal obstruction had a substantial negative impact on trade between Europe, Asia and the Middle East. Each day of the blockage is estimated to have cost global trade in the range of $6-$10 billion, leaving a maritime mess that could be seen from space. Even after the Ever Given was floated and the canal freed, it required several days to clear the bottleneck traffic jam that followed.

Now, a month later, the after-effects of the blockage can still be felt around the globe in both serious and bizarre, unexpected ways, from increases in natural gas prices (*1) and Canada-wide shortages of tapioca pearls used in bubble tea (*2), to garden gnome shortages in the UK, which saw a recent spike in popularity as many homeowners discovered a passion for gardening during ongoing COVID-19-related lockdowns (*3).

Indeed, there are many lessons to be learned from the recent supply-chain disruptions caused by the global pandemic and the Suez Canal blockage. These may include focusing on a risk-based approach to shipping, including developing transportation strategies that include a variety of "back-up" trade routes and destination entry points, and ensuring that products are sourced from more than one supplier. Those involved in the transportation industry would also be wise to include well-drafted *force majeure* clauses in their contracts--if worded correctly, such a clause could, for example, excuse ship owners stuck in the canal blockage from delay in cargo delivery.

The losses and economic consequences arising from the Suez Canal blockage are sure to cause a continuous domino-effect that ripples throughout the supply chain and transportation industry. The consequences will likely be distributed across many industry players. Gordon Hearn's article in this edition of *The Navigator* provides an overview of how the Suez Canal blockage may result in a variety of legal claims between the affected ships and their cargo.

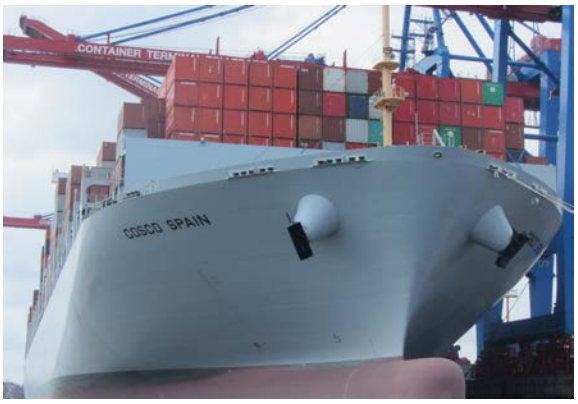
Janice C. Pereira

Endnotes

(*1) "White House Sees Energy Market Risks from Suez Canal Shutdown". Bloomberg. March 26, 2021. < https://www.bloomberg.com/opinion/articles/2021-04-23/stock-market-will-get-over-biden-s-capital-gains-tax-increase>.

(*2) "How the ship that got stuck in the Suez Canal is impacting how bubble tea is made in Calgary". CBC News. April 21, 2021. < https://www.cbc.ca/news/canada/calgary/calgary-bubble-tea-shortage-1.5997180>.

(*3) "Suez Canal blockage and COVID-19 blamed for garden gnome shortage". News.com.au. April 17, 2021. < https://www.news.com.au/finance/economy/world-economy/suez-canal-blockage-and-covid19-blamed-for-garden-gnome-shortage/news-story/aeae29e9f5f27cbcf7bb1cab17a4136a>.



4. The Suez Canal Saga – Part 2: The Likely Ripple Effects

Janice Pereira's article ("*The Domino Effect of the Suez Canal Saga – Part 1*") in this edition of *The Navigator* addresses the recent blockage of the Suez Canal. This incident promises to give rise to wide ranging effects affecting the global economy, both immediate and going forward.

The metrics are staggering, simply in terms of the volume of cargo on the *EVER GIVEN* and on the "tailback" ships – those ships that were delayed in their westbound and eastbound routes through the Canal. One estimate has it that some 350 cargo carrying vessels were affected, the transit delays of which held up some $9.6 billion of goods a day. (*1)

Ben Chapman of *The Independent* provides an interesting take on how just this one incident may have such a far-reaching effect on trade (*2):

> All of which raises questions about how sustainable it is for global trade to be so reliant on boats as long as the Empire State Building being steered down a narrow man-made trench hundreds of times a year …
>
> The fallout has just begun. Shipping giant Maersk forecasts the impact of the backlog will take months to work through global supply chains. Insurers will pick up the tab for cargo holder's losses, then spend years in courts and arbitration claiming back as much as they can from ship owners and carriers. For the businesses whose goods have been delayed in the boats queued up, it may be difficult to recover money for loss.

This is as they say, "early days". Forecasts are already being made on the possible future effect on commodity pricing and transportation and insurance costs. One thing for certain is that there will be a multitude of claims between various interests that will likely see wide ranging litigation. A preliminary listing or forecast of claims likely to come forward, some of which are already in the making, is as follows (*1):

Shippers, Consignees and Claims against Freight Forwarders and Ocean Carriers

Cargo will be late arriving at an intended destination, whether it be on the EVER GIVEN, one of the affected "tailback" vessels (that is, a delayed vessel waiting for passage through the Canal), or by virtue of secondary transportation logistical problems. Commentators predict port congestion going forward as multiple vessels may now call at various ports in more concentrated fashion and timing than would be the case if the normal flow of traffic transited the Suez Canal. Shippers or cargo interests (or their cargo insurers) may claim transit loss or damage or simple delay damages arising from the events in question.

These claims will see ocean carriers claiming exoneration from breach of contract claims as a function of applicable carriage of goods laws tending to relieve carriers from liability. Claims against the EVER GIVEN by shippers involved in that particular voyage may see a defence to liability in the nature of the so-called "negligent navigation" defence. Defences may also be raised that the incident occurred without the "actual fault or privity" of the EVER GIVEN operators – there being the suggestion in the press that a sandstorm and a confluence of events might be to blame for the vessel blockage incident. Certainly, claims against other carriers by shippers will see defences based on the "lack of any fault" concept. It is worth noting that many ocean carriers' bills of lading include language along the following lines:

> The carrier does not promise or undertake to load, carry, or discharge the Goods on or by any particular vessel, date or time. Advertised sailings and arrivals are only estimated times, and such schedules may be advanced, delayed or

> cancelled without notice. In no event shall the Carrier be liable for consequential damages or for any delay in delivery in scheduled departures or arrivals of any Vessel or other conveyances used to transport the Goods by sea or otherwise. If the carrier should nevertheless be held legally liable for any such direct or indirect or consequential loss or damage caused by such alleged delay, such liability shall in no event exceed the freight paid for the carriage.

Claims might also be brought against freight forwarders who may or may not have assumed responsibility for cargo while in transit. In addition to the assessment of issues as to whether any such obligations were assumed, defences will certainly be raised in the nature of the foregoing. In this context it is worth noting that the Standard Trading Conditions of the Canadian International Freight Forwarding Association, Inc. ("CIFFA") (*3) provide, amongst other items, that:

> 19. FORCE MAJEURE
>
> The Company shall be relieved of any and all liability for any loss or damage if, and to the extent that, such loss or damage is caused by extraordinary circumstance beyond the Company's control and which could not be avoided by the exercise of reasonable diligence, *inter alia:* strike, lockout, work stoppage, or restraint of labour; acts of war; natural disaster; riots or civil unrest; outbreak of disease, epidemic, pandemic, or quarantine; and acts of Princes or governmental authorities. In such circumstances the Company is entitled to modify its services, procedures, rates, prices, and surcharges as in the Company's reasonable discretion are considered necessary, and the Forwarder is entitled to full remuneration and indemnity for any charges so incurred or applied

Importers / Buyers claims against Shippers

Invariably consignee buyers will complain about the late delivery of goods, and the fact that the delays in question may have compromised the condition and quality of products shipped. While possibly the subject of marine cargo insurance, such claims might be made between contracting parties directly, and even if there is insurance as noted below it is not clear what damages or claims will be covered by insurance.

These claims will call for assessment on how the parties to an international contract of sale governed their affairs. Who had risk, and what were the shipper's delivery obligations? Where does the transit delay and related damage fit into the mix?

In this context, as a sample contract wording, it is worth noting that the *United Nations Convention on Contracts for the International Sale of Goods, 1980* (the "CISG"), which has presumptive application in sales contracts, provides that:

> Article 79
>
> (1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences
>
> (4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

Sellers having delivery obligations that may not have been satisfied may cite Force Majeure language along the lines of the CIFFA terms;

however, each particular contract will of course govern.

Claims against the EVER GIVEN interests.

There may be claims filed by interests involved with the other vessels delayed in the Canal shut down as against the owners and/or operators of the EVER GIVEN and their insurers. This will involve interesting questions as to whether the governing body of law contemplates such a right of action and whether the EVER GIVEN interests can be said to have owed a legal a duty to any such class of claimants.

Cargo Interests claims on Cargo Insurance Policies

A critical – and no doubt high volume of activity – will involve claims against cargo insurers for loss, damage and/or delay to shipped product.

Mr. Chapman suggests in his comment above that "Insurers will pick up the tab for cargo holder's losses…*".* Will they? Each separate policy of insurance will have to be assessed for any given claim. It is worth nothing that under standard cargo London-type market "all risk" policies that claims for "loss, damage or expense caused by delay, even though the delay be caused by a risk insured against …" are exempted from coverage. (*5)

Claims between Vessel Ownership Interests and Vessel Time and Voyage Charterers

Many of the affected "tailback" vessels were under charter. Time-chartered vessels may be regarding as having remained "on-hire" during the shutdown, which would erode revenue generating time planned on by the time charterer, while being of neutral concern for the relevant shipowner. Similar considerations may apply in respect of voyage charterers or other interests repositioning vessels outside of any contract mandate.

Claims by Affected Tailback Vessels for out-of-pocket costs

The affected tailback vessels may not be able to claim potentially sizable out-of-pocket expenses from their insurance coverage. According to one commentator (*6):

> … only the handful that have availed themselves of "delay cover" – which unlike hull and Protection and Indemnity (P & I) coverage is not customary, can expect to make a recovery for same. It is not known what proportion of voyages are protected by such policies at any one time. But estimates by marine insurance insiders suggest that it could be in the order of 10%. The possibility that 90% of affected vessels are not covered will add to industry gloom over the situation.
>
> The knock on effects could include a deepening of container shortages already entailed by coronavirus, disruption to oil trades and an increase in the number of port delays. Insurers are baking in the spike of demurrage costs.

Those on voyage charters or repositioning without contracts are losing out on earning potential.

EVER GIVEN's "General Average" claim against cargo owners and interests for cargo

The EVER GIVEN interests are reported to have made a "General Average" declaration (*7) on April 6, 2021. Observers expect extensive litigation both in respect of cargo claims and in respect of this General Average declaration with the EVER GIVEN having been laden with 20,000 containers carrying cargo for up to 20 cargo interests per container.

EVER GIVEN owners claims against her Operators

It is reported that a claim was filed by the owners of the EVER GIVEN against those operating that ship at the time of the blockage in United Kingdom High Court

Egyptian Port Authority claim against the EVER GIVEN and her associated interest for losses including expenses

It is reported in the press that the relevant Suez port authority has asserted a lien on the EVER GIVEN in respect of the heavy expense in the dredging / removal operation to free the vessel and in connection with other losses caused by the forced Canal shutdown.

SALVOR interests claims against the EVER GIVEN

There will also be a significant claim for salvage reward by those interests involved in "saving the voyage" of the EVER GIVEN in freeing her from her stranding.

Conclusion

As stated above, we are very early in the post-blockage aftermath. In light of the foregoing, the story of the EVER GIVEN promises to the subject of a very wide array of claims and disputes going forward.

Gordon Hearn

Endnotes

(*1) This is not granting legal advice. The purpose of this article is to indicate the nature of claims coming forward or that might come forward and the issues that we can expect to be raised in each particular context.

(*2) *BBC News* 26 March, 2021, (https://www.bbcnews.com) Justin Harper citing Lloyds List values of westbound traffic at $5.1 billion per day and eastbound around $4.5 billion a day.

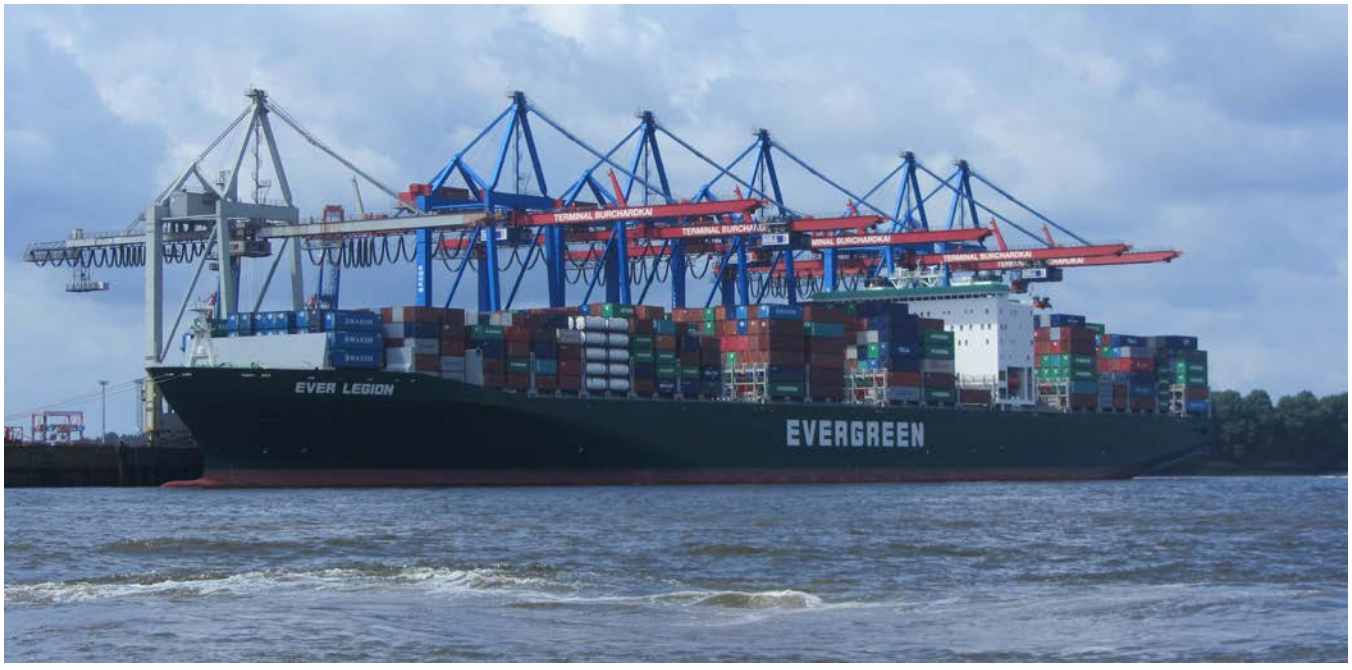
(*3) *The Independent*, March 29, 2021 (https://www.independent.co.uk/author/ben-chapman.

(*4) Adopted June 11, 2020

(*5) i.e. All Risks Institute Cargo Clauses (A) (1/1/09)

(*6) David Osler, Lloyd's List, March 25, 2021 "*Almost all Suez Tailback vessels likely lack coverfordelays*" *https://lloydslist.maritimeintelligence.informa.com/LL1136251/Almost-all-Suez-tailback-vessels-likely-lack-cover-for-delays*

(*7) The law of general average is a principle of maritime law whereby all stakeholders in a sea venture proportionally share any losses resulting from a voluntary sacrifice of part of



the ship or cargo to save the whole in an emergency

5. Federal Court Applies Ontario *Wagg* Principles: Early Disclosure of Crown Brief Denied - *O'Leary v Ragone* 2021 FC 185

On February 1, 2021 the Federal Court of Canada dismissed motions under Rule 233 (1) of the Federal Court Rules to compel the Ontario Provincial Police ("OPP") and the Public Prosecution Service of Canada ("PPSC") to provide early disclosure of police records and the Crown Brief in a regulatory criminal proceeding to the litigants in an associated civil proceeding. The alternate ground of relief raised by a party in the civil proceeding seeking the examination for discovery of an OPP officer pursuant to Rule 238 of the Federal Court Rules was also dismissed. (*1)

Facts

On August 24, 2019, there was a collision between a pontoon boat and a speedboat on Lake Joseph in Ontario. Two of the passengers on the pontoon boat were fatally injured. After investigation, the PPSC laid charges against both operators. The operator of the pontoon boat was charged with failing to exhibit a stern light on a power vessel underway, contrary to Rule 23(a)(iv) of Schedule 1 of the *Collision Regulations* CRC c 1416 of the *Canada Shipping Act,* 2001 SC 2001. The operator of the speed boat was charged with operating a vessel in a careless manner, without care and attention or without reasonable consideration for other persons, contrary to s 1007 of the *Small Vessels Regulations* SOR/2010-91 of the *Canada Shipping Act*. Neither of the offences included prison sentences, but were "criminal in nature" (*2) and, accordingly, all investigative and prosecution documents were disclosed to the operators' criminal defence counsel.

On the civil side, wrongful death actions were commenced in the Ontario Superior Court by the families of the deceased against the operators and owners of the two vessels, who in turn brought Federal Court limitation actions (*3), seeking the constitution of a limitation fund, the suspension of all other civil claims arising out of the collision, and a declaration that the the operators/owners were entitled to limit their liability. The Federal Court granted the Order regarding the limitation funds and all claimants were enjoined from proceeding in other jurisdictions pending the determination of the operators/owners' rights to limit their liability.

After pleadings closed, the defendant families brought motions in the Federal Court actions to compel production of the Crown brief and police records. The OPP and PPSC opposed the motions but undertook to provide the disclosure after the trials of both operators had been completed. (*4) The remaining trial of the speed boat operator was scheduled for July 23, 2021, being just 6 months from the motions' hearing date of January 29, 2021.

The Motions

The ultimate issue with respect to the Crown brief therefore was whether the Court should order its disclosure immediately, without waiting for the conclusion of the speed boat operator's regulatory criminal trial.

The Court found that the moving parties satisfied the requirements of Rule 233 (1) of the Federal Court Rules regarding production from non-parties in that the information sought from the OPP and PPSC was compellable at a civil trial and relevant to establishing or disproving the speed boat operator's negligent operation and/or the pontoon boat operator's failure to display the required navigation lights.

The Court, however, confirmed that Rule 233 was discretionary and that production by a non-party was an exceptional remedy, a blunt reminder that there is no entitlement to such an order even where the information sought is relevant and compellable. (*5)

The Court went on to examine the factors to be considered when exercising its discretion regarding production from a non-party pursuant

to Rule 233 of the Federal Court Rules. (*6) These factors included: (a) whether the information can be obtained from another party or source; (b) the necessity of the order; (c) whether an order is premature; (d) the necessity and probative value of the documents in light of documents already disclosed; (e) the privacy interests of, or prejudice to, other non-parties; (f) confidentiality concerns; (g) public interest in disclosure; (h) delay, cost or disruption in the proceedings; (i) the non-party's involvement in the matter under dispute; (j) the specificity of the request for production; and (k) any costs to the producing party.

The Court also went on to consider the Ontario case law argued, which case law is not binding authority on the Federal Court. Prothonotary Tabib confirmed that, on a Rule 233 motion, the Federal Court, in an appropriate case, could consider the factors identified by the Ontario Court of Appeal in *Ontario (AG) v Ballard Estate* (*7), which case dealt with production from non-parties under Rule 30.10 of the Ontario Rules of Civil Procedure, especially given that many of the factors were already recognized in the Federal Court's own jurisprudence.

The Court noted that all parties agreed that cases involving the Crown brief in criminal prosecutions and the protection of the integrity of the ongoing prosecution was "a serious policy and public interest consideration" that must be taken into account. Again, Tabib P. considered Ontario caselaw and the discussion regarding underlying policy and public interest considerations in the Ontario Superior Court's decision, in *DP v Wagg* (*8) ("*Wagg*"), which outlined the relevant principles and set out a screening process by which these principles could most adequately be considered and applied.

Motions Denied

The Court found that:

(1) the timing was very early in the proceedings; discoveries had not yet occurred and the civil matter would not be ready for trial for at least another year. The disclosure, in any event, would be provided within 6 months of the hearing date of the motions and would be available even earlier in the public record from their use at trial. The Order sought was therefore unnecessary and the motion was premature.

(2) Fairness: the Court found that the parties were all on the same footing and Tabib P. did not accept that the Defendant families were at a disadvantage regarding investigation of the incident. In fact, the disclosure of the information sought had only been provided to the operators' criminal counsel (not their civil counsel) and undertakings had been made to keep such disclosure only for the purposes of the defence of the criminal trial and physically be kept strictly in their own offices.

The Court further rejected the submission that failure to obtain disclosure immediately prevented expeditious handling of the civil litigation or restricted any ability to find witnesses, avoid fading memories and loss of evidence due to destruction, or to accumulate evidence while it is fresh. The Defendant families were rather at liberty to conduct their own investigation and there was nothing in the possession of the Crown brief that would enhance their ability to identify and locate witnesses.

While sympathetic, the Court confirmed that consideration of the Defendant families' need for closure was not a procedural or substantive unfairness or prejudice in the litigation, and no evidence of real or apprehended psychological harm had been presented.

(3) Public interest: the Court considered whether an Order for production would be injurious to the public interest and would jeopardize the integrity of the prosecution and the fair trial rights of the accused. The Court found that there was and continued to be considerable public interest in the incident, that active efforts on the part of the media had made details of the case widely disseminated. Prothonotary Tabib found

that production of the Crown brief might jeopardize the integrity of criminal prosecution, which case law recognized as a serious policy and public interest consideration, per W*agg* and *Dixon v Gibbs* (*9) That likelihood was, in this case, found to be well supported by the evidence and constituted another strong factor militating against ordering disclosure.

The Court further found that any strict confidentiality provisions, even if imposed, would likely not provide adequate safeguards against leakage to the media in the circumstances of the case.

The Court was also not inclined to minimize the importance of the public interest concerns because of the regulatory nature of the accusations or because the charges did not carry a prison sentence. Tabib P. stated at paragraph 39 that "the administration of criminal regulatory justice should not take a back seat to the pursuit of civil compensation for the victims, especially where the criminal proceedings have been proceeding expeditiously and where allowing them to follow their course will not detract from the fair and expeditious determination of the civil recourse."

(4) The Court also found that the OPP could not be compelled to produce an officer for examination for discovery citing that the issue has been authoritatively resolved by the Supreme Court of Canada in *Canada v Thouin* (*10). The Crown was historically exempt, at common law, from the obligation to submit to discovery, even in proceedings in which it was a party and that immunity would only be removed by a clear and unequivocal expression of legislative intent. The Court went on to confirm that S. 19(2) of the Ontario *Crown Liability and Proceedings Act, 2019* SO 2019, c 7 did not provide such intent, but rather entrenched that common-law immunity.

Finally

This case is instructive to all parties and their counsel who seek production of information from non-parties. Courts are protective of the rights of all parties and will consider all interests as appropriate. While laudable that parties might seek to expeditiously move their cases ahead, the rights of an accused will not be sacrificed without real and substantial grounds nor will a court easily provide production of a non-party's information where there are other sources or methods to obtain such information and where there is no urgency or particular delay. Such motions will be successful only in exceptional and therefore limited cases and are heavily fact dependent.

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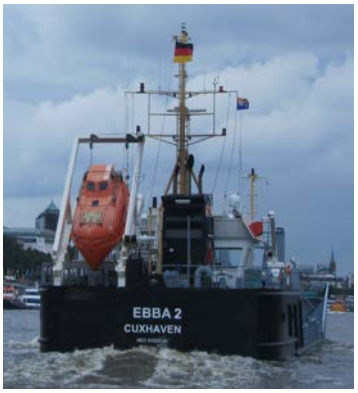
Endnotes
(*1) Rui Fernandes successfully argued this motion as counsel for O'Leary.
(*2) para. 4
(*3) Limitations Actions are brought pursuant to the *Marine Liability Act* SC 2001, c. 6
(*4) at para 7. The undertaking to disclose was subject to review and specific redactions to protect personal information of third parties or for public interest reasons.
(*5) *Hospira Healthcare Corp. v Kennedy Institute of Rheumatology*, 2019 FCA 188
(*6) at para 15. *Hospira Healthcare Corp. v Kennedy Institute of Rheumatology*, 2018 FC 992 (upheld at 2019 FCA 188). The Court provided further caselaw decided under Rule 233.
(*7) [1995] OJ No 3136
(*8) [2002] OJ No 3808, (aff'd at [2004] OJ No 2053)
(*9) [2003] O.J. No 75 (SCJ), paras 27 to 29
(*10) [2017] 2 S C R 184



6. Federal Court Grants Judgment on Summary Trial

The Federal Court of Canada recently released its decision in *United Yacht Transport LLC v. Blue Horizon Corp. et al* (*1). This case illustrates how a party can make use of the Federal Court's rules for summary trial in order to bring a matter swiftly to a close without a costly full trial. It also serves as a reminder for parties to put their best foot forward and ensure that they present evidence on all aspects of their case.

The plaintiff, United Yacht Transport LLC, moved the yacht known as "The Knight Ship," owned by the defendant, Blue Horizon Corporation ("Blue Horizon"), from Port Everglades, Florida to Nanaimo, British Columbia. It did so pursuant to a booking note signed by Mr. Knight, the director and sole shareholder of Blue Horizon, in which the defendant agreed to pay $102,800 USD to have the yacht moved (the "Booking Note").

When the yacht arrived at the port for loading onto the ship, it was found to be too heavy, and so 7 tonnes of fuel were removed. The yacht was loaded and moved from Florida to British Columbia, where it was placed under arrest pending the outcome of this action. There was no dispute that the yacht had been moved pursuant to the Booking Note, that Blue Horizon had agreed to pay $102,800 USD under the Booking Note, or that no funds had been paid pursuant to this agreement.

The plaintiff brought a motion for summary trial pursuant to Rules 231(1) and 216(6) of the *Federal Courts Rules*, SOR/98-106 (the "*Rules*"), seeking recovery of the amount owed under the Booking Note, plus additional charges, for a total amount of $164,074 USD plus interest and costs. The additional charges comprised of demurrage, fuel removal services, towing, and fees for exceeding the specified weight. The defendants resisted the motion for summary trial, denying that they owed any additional amounts. The defendants also sought to set-off against the plaintiff's claims both the value of the fuel that was removed from the yacht as well as amounts for damages they say were caused during the transport of the yacht. The defendants claimed that the value of the fuel removed was $30,000 USD, and that the plaintiff caused damages to the yacht in the amount of $3,000.

Judgment was granted in favour of the plaintiff in the amount of $160,199 USD. In coming to this decision, the Court addressed the following key issues: 1) the suitability of this matter for summary trial; 2) whether the defendants were liable to the plaintiff for the full amount claimed; and 3) whether the defendants should be allowed to set-off.

A. Suitability for Summary Trial

Under Rule 216(6) of the *Rules*, if the Court is satisfied that there is sufficient evidence for adjudication (regardless of the amounts involved, the complexities of the issues and the existence of conflicting evidence) the Court may grant judgment either generally or on an issue, unless the Court is of the opinion that it would be unjust to decide the issues on the motion. The Court reiterated the well-known principles that the burden is on the moving party to demonstrate that summary trial is appropriate (*2), that both parties have an obligation to put their "best foot forward" in a summary trial (*3), and that an adverse inference can be drawn if a party fails to cross-examine on an affidavit (*4).

The plaintiff argued that summary trial was appropriate because this was a straightforward breach of contract claim, and all of the evidence needed to determine it was in the record.

The defendants, on the other hand, argued that the motion for summary trial should not be granted, because the motion was brought without discussion, the plaintiff's evidence on core questions was based on hearsay, that they had not had an opportunity to cross-examine on the affidavit filed by the plaintiff, and that

there was a conflict in the evidence on important facts. The defendants thus reasoned that proceeding by way of summary trial would produce unnecessary complexity and result in litigating in slices, which is contrary to the guidance of the relevant jurisprudence.

In considering both positions, the Court found that the defendants had an opportunity to seek to cross-examine the plaintiff, but they did not make any request to do so. They could not reasonably argue that they did not have an opportunity. The Court further found that the issues in dispute could largely be determined based on documentary evidence, in particular the Booking Note, the text messages and e-mails, as well as the transcripts of the telephone conversations between the principals recorded by Mr. Knight and other documents prepared by third parties. Therefore, the Court found that credibility was not a determinative consideration and that there was enough evidence to render judgment on the entirety of the claims. It was an appropriate matter for determination by way of summary trial.

B. Whether the defendants were liable to the plaintiff for the full amount claimed.

The plaintiff claimed for the following losses: 1) the Booking Note fee for moving the yacht in the amount of $102,800 USD; 2) demurrage in the amount of $22,500 USD; 3) fuel removal services in the amount of $2,850 USD; 4) towing in the amount of $2,000 USD; and 5) a fee for exceeding the specified weight pursuant to the Booking Note in the amount of $33,924 USD.

The Court reviewed the Booking Note and found that it was clear and unambiguous, and that it was entered into by two commercial parties. The defendant conceded that it had agreed to pay the fee for moving the yacht in the amount of $102,800 USD, and that the yacht had been moved accordingly.

The Court found that the terms of the Booking Note were clear. Clause 5 of the Booking Note made it abundantly clear that it was the sole responsibility of the yacht owner to certify the weight of the vessel. Clause 5.2 stated that the "Yacht Owner, upon booking, is deemed to have guaranteed to the Carrier the accuracy of the Yacht's particulars, including [its] weight." Clause 6 also clearly stated that it was the yacht owner's responsibility to make the vessel as light as possible. The court accepted the evidence of the plaintiff that the yacht was heavier than the weight listed on the Booking Note. Hearsay evidence, although present in the plaintiff's affidavit, was not considered as there was other proper evidence on which to determine the weight.

The demurrage rate was fixed in the Booking Note at $15,000 USD per day. The yacht was scheduled to be loaded on May 2, 2019 at 2:00 p.m., but because of the weight issue, and the time taken in efforts to remove the fuel to make it lighter, it was not loaded until May 4, 2019. On its face, the delay supported the demurrage charge of $22,500 USD.

Clause 5.3 of the Booking Note provided that "the Yacht Owner shall indemnify the Carrier against all loss, damages, and expenses arising or resulting from inaccuracies, misrepresentations or omissions in stating such particulars." Under Clause 11.3 of the Booking Note, "[a]ny dues, duties, taxes and charges which… may be levied on any basis such as the amount of freight, weight or cargo or tonnage of the Yacht shall be paid by the Yacht Owner." The Court found that these provisions, together with a supplemental oral agreement between the plaintiff and the defendant, provided a legal basis for the plaintiff's claims for fuel removal services in the amount of $2,850 USD (subject to the Defendants' claim for a set-off, discussed below), as well as the charge for towing in the amount of $2,000 USD.

Thus, the Court found that the facts were sufficient to support the plaintiff's claim for payment of $164,074.50 USD.

C. Set-off

The defendants' claim for set-off (that is, offsetting any award that the plaintiff might be entitled to with that of their own) was based on the alleged unlawful conversion of the fuel that was removed from the yacht, or in the alternative, based on the unjust enrichment of the plaintiff. The defendants also claimed set-off for damage to the yacht that they said occurred during its transportation from Florida to British Columbia.

The plaintiff admitted that it was responsible for the removal of the fuel and offered no explanation as to where the fuel went. The plaintiff argued that it was justified in removing the fuel in light of the circumstances facing the defendants when it was discovered that the yacht was heavier than the weight certified in the Booking Note. The plaintiff further argued that it acted pursuant to the director of Blue Horizon's general instruction "to do whatever is in my best interests" which formed part of the oral supplementary agreement between the parties.

The Court found that the plaintiff did not commit the tort of conversion, because it acted pursuant to a supplementary agreement reached between the parties. The Court found, however, that the plaintiff's conduct was not entirely consistent with that agreement, because it did not fully account for the sale value of the fuel or put the fuel onto the ocean-going vessel for transportation to Canada, the only two options it had under the terms of the supplementary arrangement with Blue Horizon.

Blue Horizon provided little evidence supporting its valuation of the off-loaded fuel. Although there were gaps in the evidence, it was clear that the plaintiff provided an invoice showing transfer and disposal costs, as well as a credit of $1,125 USD for "proceeds from fuel" relating to only a portion of the fuel that was off-loaded.

The Court found that a reasonable damage estimate for the plaintiff's breach of its agreement with the defendant was $5,000 USD minus the $1,125 USD that was already credited. And so, the defendants were entitled to a set-off for the value of the fuel removed from the yacht in the amount of $3,875 USD.

With respect to the defendants' claim for set off with respect to the damage to the yacht, the Court stated that the defendants' evidence in support of this claim was entirely lacking. The defendants had the opportunity to bring forward such evidence and failed to do so.

Thus, judgment was granted in favour of the plaintiff in the amount of $160,199 USD, being the plaintiff's claim of $164,074 USD minus set-off for the off-loaded fuel in the amount of $3,875 USD.

Andrea Fernandes

Endnotes
(*1) 2020 FC 1067
(*2) Reference was made to *Teva Canada Limited v Wyeth and Pfizer Canada Inc*, 2011 FC 1169 at para 35, appeal allowed on other grounds 2012 FCA 141.
(*3) Reference was made to *0871768 BC Ltd v Aestival (Vessel)*, 2014 FC 1047 at para 62.
(*4) Rule 216(4) of the *Rules*.

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