Federal Court Cour fédérale

Date: 20160307

Docket: T-520-10

Citation: 2016 FC 287

Ottawa, Ontario, March 7, 2016

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

J.D. IRVING, LIMITED

Plaintiff

and

SIEMENS CANADA LIMITED, MARITIME MARINE CONSULTANTS (2003) INC., SUPERPORT MARINE SERVICES LTD., NEW BRUNSWICK POWER NUCLEAR CORPORATION, BMT MARINE AND OFFSHORE SURVEYS LTD., AND DANIEL MACPHERSON carrying on business as MACPHERSON MARINE GROUP

Defendants

SUPPLEMENTAL REASONS AND JUDGMENT

[1] On January 22, 2016 Judgment and Reasons were issued in this matter (2016 FC 69). However, as indicated in paragraph 329 of that decision, given my findings as to recklessness, it was unclear whether MMC and Bremner still required a ruling on the issue of whether,

pursuant to Article 1(4) of the *Convention on Limitation of Liability for Maritime Claims, 1976,* as amended by the *Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976* (collectively, the "*Limitation Convention*"), they are persons for whose act, neglect or default JDI, as a shipowner, is responsible, thereby entitling MMC and Bremner to limit their liability. I stated that I remained seized of the matter and that if the parties required a decision on that ground then supplemental reasons would be issued. By way of letter to the Court dated January 26, 2016, counsel for MMC and Bremner indicated that those parties do seek an Article 1(4) determination. Accordingly, these supplemental reasons and judgment address that issue. The content of the original decision will not be repeated in these supplemental reasons but is hereby incorporated by reference.

[2] The discrete issue is, therefore, whether MMC and Bremner are entitled to the benefit of the limitation pursuant to Article 1(4) of the *Limitation Convention*, which states as follows:

> If any claims set out in Article 2 are made against any person for whose act, neglect or default the shipowner or salvor is responsible, such person shall be entitled to avail himself of the limitation of liability provided for in this Convention.

[3] It is not disputed that JDI is a "shipowner" as defined by Article 1(2) of the *Limitation Convention*. It is MMC and Bremner's position that they are persons for whose act, neglect or default JDI, as a shipowner, is responsible and, therefore, they are also entitled to limit their liability. In this regard, MMC and Bremner interpret Article 1(4) to extend the class of persons entitled to limit liability to include independent contractors, provided that the shipowner is responsible for the actions of the independent contractor as a matter of law.

[4] This position is based primarily on the following excerpt from *Limitation of Liability for Maritime Claims*, 4th ed, (London: Lloyds, 2005) at 13, by Patrick Griggs:

> Article 1(4) of the 1976 Convention extends the right to limit to "any person for whose act, neglect or default, the Shipowner or Salvor is responsible" …
>
> This wording appears to extend the class of those entitled to limit liability. Whereas Article 6(2) of the 1957 Limitation Convention and section 3(2) of the 1958 Act afforded the right to limit to the "Master, members of the crew and other *servants* of the Owner…acting in the course of their employment", Article 1(4) of the 1976 Convention is apparently wide enough to encompass agents and independent contractors such as stevedores provided the shipowner is responsible for their actions as a matter of law.
>
> It is by no means clear what is meant by the word "responsible". Given a restricted interpretation it could mean that, for example, a stevedore must show, contrary to The "*White Rose*", that he is a "servant" of the Shipowner before he can establish an independent right to limit. Given a wider interpretation it may only be necessary for the stevedore to show the Shipowner was "responsible" for him being involved.
>
> In the context of claims for damage to cargo, Art III, rule 1, of the Hague-Visby Rules places an obligation on the shipowner before and at the beginning on the voyage to exercise due diligence to make the ship seaworthy. In *The* "*Muncaster Castle*" [[1961] 1 Lloyd's Rep 57] the House of Lords held that, as far as this obligation is concerned, the shipowner is liable if the vessel was unseaworthy as a result of the acts or omissions of independent contractor whom he has engaged. It would seem to follow that an independent contractor who renders a ship unseaworthy by his act, neglect of default will be able, if he is sued by the owners of the damaged cargo, to limit his liability under the 1976 Convention.

[5] MMC and Bremner submit that s 43(2) of the *Marine Liability Act*, SC 2001, c 6 ("MLA") extends the application of the Hague-Visby Rules, as stipulated therein, in respect of contracts for the carriage of goods by water. Further, that the House of Lords in *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd, ("Muncaster Castle"),* [1961] AC 807, [1961]

1 Lloyd's Rep 57 [*Muncaster Castle*] found that the requirement in the Hague-Visby Rules to exercise due diligence to make the ship seaworthy imposed a non-delegable personal obligation on the shipowner such that it is responsible if any employee or agent, including an independent contractor, fails to exercise due diligence in making the ship seaworthy before and at the beginning of the voyage.

[6] MMC and Bremner further submit that the concept of the non-delegable nature of the obligation to provide a seaworthy ship was endorsed by the Supreme Court of Canada in *Wire Rope Industries Ltd v British Columbia Marine Shipbuilders Ltd*, [1982] 1 SCR 363 [*Wire Rope*]. There the Supreme Court found that the use of a defective tow line socket rendered a tug unseaworthy. Therefore, the charterer of the tug would escape liability only "by proving that it had exercised due diligence to make the tug seaworthy". Based on the facts of that case, the exercise of due diligence could not be proven by reference to the fact that the charterer had contracted out work, in connection with the tow line that failed, to a reputable and experienced contractor. However, the Supreme Court ultimately held that the charterer had met its burden of proof that it exercised due diligence because the failure was due to a latent defect that no amount of diligence on the part of the charterer could have detected.

[7] Based on the principles described in *Muncaster Castle* and *Wire Rope*, MMC and Bremner assert that an independent contractor or expert who renders a ship unseaworthy by his act, neglect or default saddles the shipowner, JDI in this case, with personal legal liability. To the extent that the "SPM 125" was not seaworthy, JDI "is responsible for any shortcomings of his agents or subordinates in making the [vessel] seaworthy at the

commencement of the transportation of the particular cargo" (*The Frey* (1899), 92 F 667, cited in *Charles Goodfellow Lumber Sales Limited v Borromée Verreault, Captain Fernand Hovington and Verreault Navigation Inc,* [1971] SCR 522 and in turn cited in *Wire Rope*).

[8] MMC and Bremner also submit that the non-delegable obligation to provide a seaworthy ship arises both as a result of the Hague-Visby Rules and as a part of general maritime law. It includes the suitability of the ship to carry the particular cargo and the manner in which it is stowed. The task of making the "SPM 125" seaworthy was a core function of JDI and the role of MMC and Bremner in preparing the loadout plan was in furtherance of that core function. The concept of "responsibility" in Article 1(4) speaks to this relationship. According to MMC and Bremner, if the "SPM 125" was unseaworthy then JDI is liable to Siemens and that liability is neither distinguished or diminished by engaging MMC and Bremner to carry out the duty. Thus, MMC and Bremner are persons for whose act, neglect or default JDI is responsible.

[9] MMC and Bremner concede that this is a novel argument and advise that they have been unable to identify any jurisprudence, Canadian or international, that addresses the issue.

[10] I would first note that the evidence is clear that MMC contracted with JDI, pursuant to the Irving Equipment PO, to provide naval architecture services for the subject cargo move. Further, that JDI and MMC had a longstanding relationship, that MMC provided particular expertise that JDI indicated it did not have in-house, and that MMC and Bremner were described by JDI as part of its team. It is also without question that MMC and Bremner were

required to and did provide advice on the suitability and use of the "SPM 125" for the safe loading and transport of the LP Rotors.

[11] However, in my view, this does not suffice to make MMC and Bremner persons for whose act, neglect or default JDI, as the shipowner, is "responsible" which would entitle them to avail of limitation under Article 1(4).

[12] MMC is an independent corporate entity, unlike Atlantic Towing or Irving Equipment which are divisions of JDI. There is no evidence or suggestion that Bremner was retained by JDI in his personal capacity or that he was an employee of JDI. There is also no suggestion that Bremner, at any time, acted other than in his capacity as a principal of MMC. Rather, MMC acted as an independent contractor in providing naval architectural services to JDI.

[13] The relationship of an employer and an independent contractor, unlike that of employer and employee or servant or agent, typically does not give rise to a claim for vicarious liability. In this case, the evidence is that JDI entered into contract for services with MMC. MMC provided naval architectural services that JDI did not have in-house. JDI did not supervise or control MMC's work. MMC is an independent corporate entity that was in business on its own account. In sum, the nature of the relationship between JDI and MMC was not one that attracted vicarious liability. Therefore, while MMC may have been retained by JDI on many occasions in the past and JDI may have relied on MMC for provision of naval architectural services, under Canadian law this is not sufficient to make JDI vicariously liable or responsible for MMC's acts or omissions (*671122 Ontario Ltd v Sagaz Industries Canada*

Inc, 2001 SCC 59 at paras 46-47; *1292644 Ontario Inc (Connor Homes) v Canada (National Revenue),* 2013 FCA 85 at paras 23, 39-41; *KLB v British Columbia,* 2003 SCC 51).

[14] Thus, in my view, the mere fact that JDI contracted with MMC to provide naval architectural services that were a necessary part of, or integral to, or a core function of the cargo move is insufficient to found legal responsibility as described in Article 1(4).

[15] Secondly, the Griggs article, relied upon by MMC and Bremner, states that it is by no means clear what is meant by the word "responsible" as used in Article 1(4). Griggs acknowledges that this could be interpreted broadly or narrowly. This potential for diverging interpretations is evidenced in *Shipowners' Limitation of Liability* (Frederick, MD: Aspen, 2012) at 35 by Barnabas WB Reynold and Michael N Tsimplis. The authors of that text state that the purpose of the words "persons for whose act, neglect or default the shipowner or salvor is responsible" is to prevent a claimant circumventing the right to limit by suing the wrongdoer rather than the ship, the previous success of that approach having led to the introduction of Himalaya clauses (see *Adler v Dickson (The Himalaya),* [1954] 2 Lloyd's Rep 267 and, for their acceptance in Canadian law, *London Drugs Ltd v Kuehne & Nagel International Ltd,* [1992] 3 SCR 299).

[16] Reynold and Tsimplis go on to say that the extension of the right to limit to persons for whom the shipowner is responsible clearly covers the master and crew members when they act within the scope of their employment. "However, anyone who can show that he is linked to the shipowner in a way that makes the shipowner responsible would be entitled to limit

liability" (p 35). They suggest that under English law this could include pilots because their negligence makes the shipowner liable, although pilots are also entitled by statute to limit their liability to a much lower limit. However, the authors also state that independent contractors and others involved in the shipping business may not fall within the definition, including ship's agents, stevedores and classification societies (see also Michael Tsimplis and Richard Shaw, "The Liabilities of the Vessel" in Yvonne Baatz, ed *Maritime Law,* 3d (UK: Routledge, 2014) 222 at 277-278).

[17] Further, Aleka Mandaraka-Sheppard notes in *Modern Maritime Law, Volume 2: Managing Risks and Liabilities,* 3rd Edition (New York: Routledge, 2013) at p 746-747 that Article 1(4) is mainly concerned with granting an independent right of limitation to those people for whose act, neglect or default the shipowner, or manager, or operator, or salvor will be vicariously liable.

[18] As to whether independent contractors are included in Article 1(4), Mandaraka-Sheppard uses the example of a ship repairer. When ship repairers are appointed by the shipowner to repair their ship, and the repairer's negligence causes the ship to be unseaworthy, which causes loss to third parties, the shipowner will be constructively liable to the third parties for such loss. Not because he is vicariously liable for the negligence of the independent contractor (*Salsburry v Woodland*, [1970] 1 QB 324 at pp 336-337 per Widgery LJ), but because of his direct liability to the claimant based on his non-delegable duty under Article III, Rule 1 of the Hague-Visby Rules (*Muncaster Castle*). The shipowner may then limit as against this constructive liability. The authors conclude that the repairer may be sued

separately and, as the repairer is not included in the category of people under Article 1(4), claimants would be able to bypass the limitation provisions of the *Limitation Convention*.

[19] Mandaraka-Sheppard also comments on other independent contractors such as stevedores, whose treatment under the *Limitation Convention* would depend on how a court will interpret the meaning of the word “responsible” in Article 1(4). A shipowner is not normally vicariously liable for a stevedore’s negligence at common law. However, stevedores may be included within the category of persons failing within Article 1(4), if the shipowner were responsible for the acts and omissions. The author does not elaborate on what this might mean.

[20] In my view, given the ambiguity that arises from the wording of Article 1(4) and the various possible interpretations of that Article, demonstrated in the above texts, it is necessary to examine *The Travaux Préparatoires of the LLMC Convention 1976 and of the Protocol of 1996* (the “*travaux*”), as compiled by the Comité Maritime International (“CMI”), in an effort to ascertain the intention of the Member States as regard Article 1(4) within the context and purpose of the *Limitation Convention*.

[21] As set out in my reasons issued on January 22, 2016, at paragraph 260, international conventions, as well as the legislation implementing them in Canada, such as the MLA, are to be construed in accordance with the *Vienna Convention on the Law of Treaties*, Can T.S. 1980 No 37 (“*Vienna Convention*”) (*Peracomo FCA* citing *Yugraneft Corp v Rexx Management Corp*, 2010 SCC 19 at para 19; *Pushpanathan v Canada (Minister of*

Employment and Immigration), [1998] 1 SCR 982 at para 51). Article 32 of the *Vienna Convention* permits reliance on the *travaux* and the circumstances in which the treaty was concluded as supplementary means of interpretation for ambiguous provisions.

[22] In this matter the *travaux* indicate that some delegations suggested that the right to limit liability should be accorded not only to operators (owners, charterers, etc) and their servants, but also to other persons rendering services in direct connection to the operation of the ship, such as stevedores and salvors, and also to the owner, shipper or receiver of goods carried in the ship.

[23] In that regard, it had been proposed that limitation of liability be retained for owners, operators and charterers as in the 1957 Convention and that the right be extended to certain persons rendering services in direct connection within the navigation or management of the ship and to salvors. As to whether "contractors" who are exposed to limitation claims should also be entitled to protection, such as owners, shippers and receivers of cargo carried in the ship, this proposal was rejected. It was noted that under the 1957 Convention (Article 6) "servants" of the owner, "acting in the course of their employment" were entitled to limit their personal responsibility in the same way as their principal, and that:

> …The idea is that a person for whom the principal is responsible shall be able to limit; otherwise the principal's own protection may be impaired. It was suggested to replace the word servants with the wide term "servants or agents", *but it was felt that* "*agents*" *might include persons for whom the principal has no vicarious liability.* It was also pointed out that the restrictive words "acting in the course of their employment" were too narrow, for instance in the case where the Shipowner is held liable for the crew acting outside of their employment.
>
> …

> The solution adopted in the Draft is to relate the employees' right to limitation directly to the fact that the principal is responsible for his "act, neglect or default" (p 35).
>
> (emphasis added)

[24] During one session of the Legal Committee of the Intergovernmental Maritime Consultative Organization ("Committee"), as it was then known, focus was on those persons who were not covered by the 1957 Convention, since shipowners, operators and charterers would retain the right to limit under the new 1976 draft. Two categories of persons were discussed. First, the category of certain "contractors" such as owners, shippers and receivers of cargo. It was explained that the CMI had decided not to extend the circle of limitation, because of the complexity of possible effects in insurance costs and the implication of such extension on non-maritime activities. A second category of persons, being those rendering service in the "loading, stowing or discharging of the ship" fell outside the scope of the concept of the "management of the ship" as found in the draft articles, which focused on services rendered while the ship was in operation. The inclusion of such persons was not agreed in the CMI deliberations, although some States were understood to extend the right of limitation to such persons through national laws.

[25] The definition of "shipowner" was also subject to debate, the proposal being that the term shipowner would include the owner, charterer, manager and operator of a sea-going ship, and any person rendering services in direct connection with the navigation or management of the ship. This proposal was rejected. The debate included the following:

> The extent to which independent contractors, employed by the operator, but for whose acts he is not liable, should be protected by limitation of liability has been the subject of extensive

discussion within the CMI. It was suggested that such protection should be given to "any person rendering service in direct connection with the operation of the ship" or, alternatively, "any person rendering service in direct connection with the navigation, management, or the loading, stowing or discharging of the ship". The first alternative was rejected by the International Sub-Committee and not raised again at the Conference. With respect to the second alternative a majority in the Sub-Committee only favoured the inclusion of "the navigation of the ship" and this was also the outcome in the Commission. In the Plenary Session of the Conference, however, the text as it now stands was carried with a substantial majority.

The inclusion of the words "in direct connection with the navigation… of the ship" means that pilots can always limit their liability whether the shipowner is responsible for them or not (compulsory pilotage). The same applies to shorebased personnel who render navigational aid to the ship, berthing masters etc.

The word "management", which is also used in Article 1, § 1 (b) of the 1957 Convention, is more difficult to construe in the light of the solutions favoured by the Conference. It is quite clear that loading, stowing and discharge fall outside the scope of the term. It is equally clear that a ship repairer who renders service to the ship whilst it is out of commission (lying at the yard, etc.) cannot limit his liability pursuant to this provision. On the other hand, travelling ship repairers rendering service whilst the ship is in operation are covered by the words "in direct connection with the management of the ship".

[396] The term "management" may not be the best expression of the thought which lies behind it, but it is strongly felt by a majority in the CMI that the term "navigation" alone is too narrow.

A person who is deemed to be rendering service "in direct connection with the navigation or management of the ship" can invoke limitation of liability for all limitable claims, not only for claims arising out of the service rendered. A travelling ship repairer who takes a turn as a helmsman can limit his liability for his default as such.

[26] Additionally:

> ***Twenty-fifth Session***
>
> [2] 8. Discussion of Article 1 at the twenty-third session had centred on the question of whether, and to whom, the right of limitation should be extended apart from the shipowner, manager or operator and whether it would be necessary or desirable to specify the type of craft comprised in the concept of the "sea-going ship".
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> 11. A majority of the Committee did not favour defining the term shipowner to include a "person rendering service in direct connexion with the navigation or management of the ship", considering the language in paragraph 2 too broad. Travelling ship repairers, tank cleaners, husbanding agents and others who might be involved in some aspects of "management" fell into a vague category which should not, in the general view of the Committee, be embraced in the term "shipowner" for limitation purposes.
>
> …

[27] The recorded debate of State delegates on the scope of Article 1(2) also demonstrates that the CMI considered, during drafting, the possibility of extending the limitation to include persons other than the shipowner. The discussion referred primarily to compulsory pilots and salvors, but it appears that it was generally agreed that it would not extend to all kinds of persons who rendered services to the ship.

[28] This debate extended into the drafting of Article 1(4). The Committee noted that with regard to vicarious liability, some delegates preferred the wording of Article 6 of the 1957 Convention referring to the "Master, Members of the crew and other servants". The Committee preferred the new Article 1(4) wording, "any persons for who act, neglect of default the shipowner or salvor is responsible" and the debate concerned whether the further addition of persons "having provided pilotage services" should be adopted. This addition was

proposed because it was recognized that pilots, particularity those of public pilotage services, including compulsory pilots, are not always considered servants of the shipowner but should be entitled to limit liability in the same way as a shipowner.

[29] Ultimately, the wording pertaining to pilots was not adopted. During the debate, however, the United States delegate introduced a proposed amendment to the wording of Article 1(4). This was to delete the word "responsible" and substitute the phrase "legally liable at law in the absence of a contract". The aim being to limit, as far as possible, extension of the right to invoke limitation as there was concern that the proposed text of Article 1(4) appeared to permit shipowners entitled to limitation to extend that right to other persons by contract. The Canadian delegate stated that he shared the concern of the United States delegate and thought that a recommendation that the word "responsible" being replaced by "liable" (which had a slightly narrower meaning) might suffice. The Norwegian delegate stated that Article 1(4) was designed to establish the principle that all persons for whom the shipowner had "civil responsibility" were entitled to invoke limitation and that the scope of that principle would normally be determined by national law. The Norwegian delegate felt that the United States' proposal might be interpreted as inadvertently excluding such civil responsibility which was not the intention. The United Kingdom delegate agreed. Ultimately, the United States delegate reconfirmed that his delegation's intention was indeed to reduce the categories of persons entitled to invoke limitation. However, the United States was prepared to withdraw its proposal and agree to the use of "responsible" if Article 1(4) was understood in this narrow sense and if the Committee agreed to that interpretation.

[30] In my view, the *travaux* provide no clear answers. However, what can be taken from them is that there was certainly no explicit intention to extend the category of persons who are entitled to limit their liability pursuant to Article 1(4) to include independent contractors. If anything, the *travaux* tend to suggest that the underlying premise of Article 1(4) is that "responsibility" remains tied to the vicarious liability of the shipowner and that a narrow interpretation was intended. While this may perhaps extend to protect pilots in specific circumstances, it does not appear to have been intended to further extend the category of persons captured by Article 1(4). Nor do the *travaux* make any reference to a shipowner's obligation to exercise due diligence in making its ship seaworthy pursuant to the Hague-Visby Rules as a basis for extending Article 1(4) responsibility to third party contractors or others.

[31] Accordingly, because the category does not appear to have been intended to extend to include independent contractors, and because JDI, as the shipowner, is not vicariously liable for the acts, neglect or default of its independent contractor, in my view, MMC and its principal Bremner are not entitled to limit their liability pursuant to the *Limitation Convention*.

[32] This view is also in keeping with the history and purpose of the *Limitation Convention,* set out in detail in my reasons issued on January 22, 2016. It will be recalled that a balance was struck between ensuring suitable compensation to claimants for loss or injury suffered and the need to permit shipowners, for public policy reasons, to limit their liability to an amount that was readily insurable at a reasonable premium. This was accomplished by

establishing limitation as high as a shipowner could cover by insurance at a reasonable rate and the creation of a virtually unbreakable right to limit liability.

[33] Shipowners are defined in the *Limitation Convention* as meaning the owner, charterer, manager or operator of a seagoing ship. To achieve its policy goals, the *Limitation Convention* facilitates shipowners obtaining favourable insurance rates by making liability amounts predictable based on the amount of the limitation. At the same time, by capping a claimant's recovery, it encourages quick resolution without litigation. The balance effected by the *Limitation Convention* between recovery and predictability assists in maintaining the international transport of goods by ship, which is of critical importance to modern global trade. In my view, it is not clear that the policy underlying the limitation was also intended to extend to independent contractors who, presumably, are capable of obtaining their own insurance or entering into contractual terms with the shipowners to address any risks and liability that may arise from the goods or services that they provide in connection with the ship.

[34] For the reasons set out above, I am not convinced that Article 1(4) was intended to extend the right to limit liability to independent contractors such as MMC. However, MMC and Bremner submit that the non-delegable obligation of JDI, as a shipowner, arising pursuant to Article III, Rule 1, of the Hague-Visby Rules, to exercise due diligence to make the "SPM 125" seaworthy, establishes that JDI is "responsible" for MMC and Bremner's acts, neglect or default pursuant to Article 1(4) of the *Limitation Convention*, if their actions caused the "SPM 125" to be unseaworthy. I am also not persuaded by that submission.

[35] Part 5 of the MLA concerns liability for carriage of goods by water. Section 41 defines the Hague-Visby Rules as the rules set out in Schedule 3 of the MLA and embodied in the *International Convention for the Unification of Certain Rules of Law relating to Bills of Lading*, concluded at Brussels on August 25, 1924, in the *Protocol* concluded at Brussels on February 23, 1968, and in the *Additional Protocol* concluded at Brussels on December 21, 1979. Subsection 43(1) of the MLA states that the Hague-Visby Rules have the force of law in Canada in respect of contracts for the carriage of goods by water between different states as described in Article X of those Rules. Subsection 43(2) extends this application in respect of contracts for the carriage of goods by water from one place in Canada to another place in Canada, either directly or by way of a place outside Canada, unless there is no bill of lading and the contract stipulates that those Rules do not apply.

[36] The Hague-Visby Rules are set out in Schedule 3 of the MLA. They define "carrier" as including the owner or the charterer who enters into a contract of carriage with a shipper. The following Articles are also relevant:

Article II	**Article II**
Risks	**Risques**
Subject to the provisions of Article VI, under every contract of carriage of goods by water the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth.	Sous réserve des dispositions de l'article VI, le transporteur, dans tous les contrats de transport des marchandises par eau, sera, quant au chargement, à la manutention, à l'arrimage, au transport, à la garde, aux soins et au déchargement desdites marchandises, soumis aux responsabilités et obligations, comme il bénéficiera des droits et

	exonérations ci-dessous énoncés.
Article III	**Article III**
Responsibilities and Liabilities	**Responsabilités et obligations**
1 The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to	1 Le transporteur sera tenu avant et au début du voyage d'exercer une diligence raisonnable pour :
(a) make the ship seaworthy;	a) mettre le navire en état de navigabilité;
(b) properly man, equip and supply the ship;	b) convenablement armer, équiper et approvisionner le navire;
(c) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.	c) approprier et mettre en bon état les cales, chambres froides et frigorifiques, et toutes autres parties du navire où des marchandises sont chargées, pour leur réception, transport et conservation.
2 Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.	2 Le transporteur, sous réserve des dispositions de l'article IV, procédera de façon appropriée et soigneuse au chargement, à la manutention, à l'arrimage, au transport, à la garde, aux soins et au déchargement des marchandises transportées.
…	…
Article IV	**Article IV**
Rights and Immunities	**Droits et exonérations**
1 Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due	1 Ni le transporteur ni le navire ne seront responsables des pertes ou dommages provenant ou résultant de l'état d'innavigabilité, à moins qu'il

diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III.

ne soit imputable à un manque de diligence raisonnable de la part du transporteur à mettre le navire en état de navigabilité ou à assurer au navire un armement, équipement ou approvisionnement convenables, ou à approprier et mettre en bon état les cales, chambres froides et frigorifiques et toutes autres parties du navire où des marchandises sont chargées, de façon qu'elles soient aptes à la réception, au transport et à la préservation des marchandises, le tout conformément aux prescriptions de l'article III, paragraphe 1.

Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article.

Toutes les fois qu'une perte ou un dommage aura résulté de l'innavigabilité, le fardeau de la preuve, en ce qui concerne l'exercice de la diligence raisonnable, tombera sur le transporteur ou sur toute autre personne se prévalant de l'exonération prévue au présent article.

2 Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from

2 Ni le transporteur ni le navire ne seront responsables pour perte ou dommage résultant ou provenant :

(a) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship;

a) des actes, négligence ou défaut du capitaine, marin, pilote ou des préposés du transporteur dans la navigation ou dans l'administration du navire;

…

…

(q) any other cause arising without the actual fault and

q) de toute autre cause ne provenant pas du fait ou de la

privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

faute du transporteur ou du fait ou de la faute des agents ou préposés du transporteur, mais le fardeau de la preuve incombera à la personne réclamant le bénéfice de cette exception et il lui appartiendra de montrer que ni la faute personnelle ni le fait du transporteur n'ont contribué à la perte ou au dommage.

…

…

Article IV *bis*

Application of Defences and Limits of Liability

1 The defences and limits of liability provided for in these Rules shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage whether the action be founded in contract or in tort.

2 If such an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor), such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under these Rules…

Article IV bis

Application des exonérations et limitations

1 Les exonérations et limitations prévues par les présentes règles sont applicables à toute action contre le transporteur en réparation de pertes ou dommages à des marchandises faisant l'objet d'un contrat de transport, que l'action soit fondée sur la responsabilité contractuelle ou sur une responsabilité extracontractuelle.

2 Si une telle action est intentée contre un préposé du transporteur, ce préposé pourra se prévaloir des exonérations et des limitations de responsabilité que le transporteur peut invoquer en vertu des présentes règles.

[37] The premise of MMC and Bremner's position appears to be that if MMC caused the "SPM 125" to be unseaworthy, then JDI will have breached its non-delegable duty and will be responsible for the acts and omissions of its independent contractor. However, to succeed in establishing that responsibility it would have to have been established at trial that the "SPM 125" was unseaworthy at the commencement of the voyage and that MMC and Bremner, as JDI's independent contractors, had caused this. Yet, in their written submissions, MMC and Bremner concede that the evidence in fact suggests that the "SPM 125" was seaworthy. Indeed, the evidence put forward at trial by JDI, MMC and Bremner was most certainly not aimed at establishing unseaworthiness, rather Bremner's evidence was that the "SPM 125" was suitable for the intended voyage. There was no evidence that the "SPM 125" was unseaworthy or that JDI or MMC or Bremner had failed to exercise due diligence in this regard. On this basis alone, MMC's position cannot succeed. I fail to see how it can be sufficient to claim an entitlement to limit one's liability pursuant to Article 1(4) by simply asserting the possibility of a "responsibility" arising if a particular set of unproven facts occur.

[38] Moreover, the *Limitation Convention* provisions were intended to reduce litigation arising from maritime claims to which it applies. Importing the need to establish unseaworthiness to permit independent contractors to avail themselves of the limitation as parties for whom the shipowner is responsible pursuant to Article 1(4) would seem to have the very real potential of complicating limitation actions and increasing litigation.

[39] In summary, for all of these reasons, I am not convinced that MMC and Bremner, as independent contractors, are persons for whose acts, neglect or default JDI, as shipowner, is

responsible pursuant to Article 1(4). Accordingly, MMC and Bremner are not entitled to limit their liability pursuant to the *Limitation Convention*.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. Maritime Marine Consultant (2003) Inc and its principal, Donald Bremner, are not persons for whose acts, neglect or default J.D. Irving, Limited, as a shipowner, is responsible pursuant to Article 1(4) of the *Limitation Convention* and, therefore, neither Maritime Marine Consultant (2003) Inc or Donald Bremner are entitled to avail themselves of the limitation of liability provided for in that Convention.

"Cecily Y. Strickland"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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