Federal Court Cour fédérale

Date: 20170508

Docket: T-655-15

Citation: 2017 FC 465

Ottawa, Ontario, May 8, 2017

PRESENT: Madam Prothonotary Mireille Tabib

BETWEEN:

ATLANTIC CONTAINER LINES AB

Plaintiff

and

CERESCORP COMPANY

Defendant

and

APM TERMINAL GOTHENBURG AB

Third Party

ORDER AND REASONS

I. Overview

[1] The Plaintiff, Atlantic Container Lines AB ("ACL") operated the container ship "HS Beethoven" pursuant to a time charter party. While the ship was being discharged in Halifax by

the Defendant, Cerescorp Company, ("Ceres"), a stack of eight 20-foot containers toppled within hold number 4 of the vessel, causing damage to the vessel and to the cargo. ACL brought the present action against Ceres to be compensated for that damage, pleading that the collapse was due to Ceres' negligent operation of the crane during unloading operations. In particular, ACL alleges that multiple and unsuccessful attempts by the crane operator to connect the crane's spreader to the top container in the stack caused the stow to collapse.

[2] Ceres, from the outset, defended ACL's claim by asserting that the collapse was caused, at least in part, by the longitudinal misalignment of the containers at the bottom of the stow, which led to the vertical misalignment of the containers stacked above. Ceres' original defence pleaded that the misalignment was solely caused by the negligence of those responsible for loading the containers. APM Terminal Gothenburg AB ("APM") was the stevedoring company who loaded the containers at the load port in Gothenburg, Sweden. It was subsequently added as a third party defendant by Ceres.

[3] Ceres now makes this motion to amend its statement of defence and counterclaim to raise, as a further cause of the misalignment of the containers, the alleged "substandard and inherently dangerous arrangement of the bulkhead vertical cell guides and tank top spacing bars within the vessel's number 4 cargo hold". The proposed amendments allege that ACL was negligent in failing to detect that defect, to take the necessary precaution to avoid the misalignment and to warn Ceres of that danger.

[4] The proposed amendments also add as a cause of the collapse the fact that loading a vertical stack of eight 20-foot containers is contrary to industry practice and created, independently of and in addition to the misalignment of containers, an inherently unstable and dangerous condition, for which ACL is ultimately liable.

[5] ACL does not dispute that a plea that the stow collapse was caused by an inherently dangerous condition of the vessel or by the method of stowage, of which the charterer knew or should have known but failed to warn the stevedores, constitutes a reasonably arguable defense.

[6] ACL however opposes the amendments on the following grounds:

- That the amendments constitute a radical departure from previous pleadings;
- That the allegations are unsupported by any evidence and are doomed to fail;
- That the amendments are untimely;
- That the amendments are prejudicial because evidence has been lost, and also because ACL's recourses against the ship may now be time-barred.

[7] For the reasons that follow, I am satisfied that it is in the interest of justice that the proposed amendments be made, on condition that particulars be provided of the way in which the arrangement of the bulkhead vertical cell guides and tank top spacing bars were "substandard and inherently dangerous".

II. Radical Departure

[8] Pursuant to Rule 221 of the *Federal Courts Rules*, SOR/98-106, pleadings may be struck where they constitute a radical departure from previous pleadings. Proposed amendments which would be capable of being struck under Rule 221 of the *Federal Courts Rules* if already part of the pleadings should not be permitted (*Pembina County Water Resource District v Manitoba*, 2008 FC 1390).

[9] I am not satisfied that the proposed amendments constitute a radical departure from Ceres' original pleadings. As mentioned, Ceres' position has from the outset been that the collapse was caused by the misalignment of the containers. The proposed amendments do not resile or depart from that assertion. Rather, instead of alleging that the misalignment was "solely" caused by the negligence of those responsible for loading the containers, the proposed amendments add a further root cause of misalignment, being the arrangement of the vertical cell guides. At the hearing, counsel for Ceres explained that the cell guides, which are metal rails affixed to the sides of the hold to help guide and keep containers aligned as they are lowered into the hold, do not extend all the way down to the bottom in that particular hold. This allegedly can allow containers to move laterally in the final stages of being lowered into the hold. The lateral movement would in turn cause the side of a container to rest on the horizontal spacing bars affixed to the bottom of the hold (the tank top) and sit at an angle, leading to vertical misalignment of all containers above.

[10] The amendments also add the allegation that a vertical stack of eight 20-foot containers is inherently unstable and dangerous, independently of and in addition to the misalignment.

[11] These additional facts are not inherently contradictory to or mutually exclusive of the facts previously pleaded. They are consistent with and complementary to Ceres' original pleadings, which identified the misalignment and improper stowage of the containers as contributing causes of the damage.

[12] The only perspective from which the proposed amendments could be considered as a departure from previous pleadings is that they raise the possibility of another person being liable for the collapse, to wit, the shipowners. The original pleadings, by identifying the sole cause of the misalignment as the negligence of those by whom containers were stowed, pointed the finger of contributory negligence solely to the loading stevedores and to ACL. From ACL's perspective, the proposed amendments, by pointing to structural anomalies of the vessel as a contributing cause of the misalignment, change that dynamic by raising the possibility of the shipowner's liability towards ACL.

[13] If the amendments are allowed, are ultimately successful and would give rise to liability of the shipowner towards ACL, they could have significant legal consequences for ACL. However, the facts pleaded in the amendments do not, in and of themselves, constitute a departure from Ceres' prior factual pleadings and accordingly do not offend Rule 221(1)(e). To the extent the amendments, if allowed, produce prejudicial legal consequences for ACL, that is a matter more appropriately considered as part of the analysis on prejudice.

III. Doomed to Fail/Insufficient Evidence

[14] ACL argues, and I agree, that the amendments as proposed do not sufficiently particularize how the arrangement of the vertical cell guides and tank top spacing bars was allegedly substandard and inherently dangerous. That said, I am not satisfied that the allegations as proposed constitute, in the circumstances of this case, a bald assertion of a conclusion or that they are symptomatic of a frivolous defence. The allegations are not proposed in the absence of any material facts, or show no reasonable prospect of success. Counsel for Ceres presented at the hearing a cogent explanation of how the discontinuity of the cell guides, which is clearly visible in the photographs taken at the time of the loss, could contribute to the alleged longitudinal and vertical misalignment. I am thus satisfied that Ceres has knowledge of particulars which, if provided, would properly define and frame this defence.

[15] As worded, however, the pleadings are so vague that they would cover a whole host of other potential defects; the nature of the alleged defects of the tank top spacing bars has also not yet been explained. ACL is entitled to know and understand the full scope of these amendments, if they are allowed. However, the lack of particulars in the circumstances is not a reason to refuse the amendments but to impose, as a condition for the amendment, the obligation of Ceres to provide particulars.

[16] ACL has pointed to discovery transcripts and documentary evidence in an effort to show that the proposed amendments have no reasonable prospect of success. It is not for the Court, on a motion to amend, to embark on the exercise of weighing competing evidence led by the parties

to determine the strength and chances of success of proposed amendments. The case of *Teva Canada Limited v Gilead Sciences Inc.*, 2016 FCA 176, on which ACL relies, stands for proposition that amendments can be refused as having no realistic chances of success or being doomed to failure where the amending party cannot point to the existence of any evidence whatsoever which, if believed, could support the conclusion it seeks. As mentioned above, Ceres has overcome this low threshold by showing that the discontinuity of the cell guides is visible on photographs taken at the time of the loss, and by presenting a cogent argument as to how the discontinuity could lead to misalignment. ACL may have a strong defence to these allegations, but motions to amend are not motions for summary judgement. Once Ceres had established the existence of a credible evidentiary support for its amendments, it did not also have to refute ACL's countervailing evidence or put its best foot forward to show that it could succeed at trial.

IV. Untimeliness

[17] ACL argues that Ceres could have made the allegations it now seeks to add well before now. I agree. However, the mere fact that amendments could have been proposed earlier does not make them untimely and is not, of itself, a reason to refuse them.

[18] Amendments are untimely and can be refused where allowing them would unduly delay the conduct of an action. Here, the amendments have been proposed shortly after discoveries, before expert reports have been prepared and before a trial date has been requested. The amendments, if permitted, will require amendments to the other parties' pleadings, and may require further discovery, but at this time, there is no indication that such discoveries would be

protracted or cause significant delay in the trial of this matter. I am satisfied that any delay that may be caused by the amendments would not be undue.

V. Prejudice: Loss of Evidence

[19] As recognized by an abundant jurisprudence, amendments can be refused if to allow them would cause prejudice to the other side that cannot be compensated by an award of costs. ACL argues that it will suffer such a prejudice from the fact that evidence relevant to the amendments has now been lost: The vessel has, last year, been sold and destroyed together with her documents and computer systems, and ACL is unable to locate the vessel's Chief Officer. Situations such as these have led the Court to find that an amendment would be so prejudicial to the other party that it should be refused (*MacNeil Estate v Canada (Indian and Northern Affairs Department)*, 2001 FCT 470).

[20] However, it seems to me that where loss of the evidence is fortuitous and the amendments were proposed without undue delay, the Court's analysis should not stop at considering only the prejudice caused to the opposing party. In considering amendments, the Court must look at all the circumstances of the case and consider simple fairness, common sense and the overarching interest of justice (*Continental Bank Leasing Corp. v Canada*, [1993] TCJ No 18, (1993) DTC 298 at page 302, as cited in *Merck & Co. Inc. v Apotex Inc.*, 2003 FCA 488, [2004] 2 FCR 459, leave to appeal to SCC refused, 30193 (May 6, 2004)).

[21] It would be unjust to refuse an amendment that is not unduly late and raises an arguable case simply because, through no fault of the amending party, evidence that might assist both

parties has unexpectedly been lost. In such a case, it is appropriate to consider whether, had the amendments been made earlier, the opposing party could or would have preserved the evidence. If the Court finds that the evidence would nevertheless have been lost, it would be unfair that the party opposing the amendment benefit – and the amending party suffer – from the fortuitous loss of evidence.

[22] The incident occurred in December 2013 and ACL issued its Statement of Claim 16 months later, in April 2015. Pleadings closed in November 2015 and discoveries were held in the summer of 2016, a relatively short period of time. As early as the summer of 2015, APM requested access to the vessel to conduct an inspection of hold number 4. The protocol for the inspection included measuring the vertical and longitudinal cell guides. The inspection was arranged to take place in March 2016, but could not be fully carried out because the hold was not emptied of containers. APM reserved its rights to request a further attendance once the vessel's hold was empty.

[23] In October 2016, in the course of answering undertakings given on discovery, ACL advised the other parties that it had just learned that the vessel had been sold and was destined to be broken up. In fact, it now appears that the vessel was at the scrap yard in September 2016 and may well already have been in the process of being destroyed. I am satisfied that the loss of the vessel, and of any documents or computer files that had not previously been secured or copied and may have been left on board the vessel, is a fortuitous and unexpected event. None of the parties appears to have been warned that this might occur, and there is no suggestion that the age and condition of the vessel made this a foreseeable event.

[24] However, I find that ACL either knew, or should have known, well before Ceres formally expressed its intention to amend, that the content of the vessel's computer, it is documents and the physical arrangements of the cell guides in its hold number 4 were relevant. The record before me on this motion shows that undertakings that called for consulting the vessel's documents and the information in her onboard computer were still outstanding in October 2016. Ceres had probed, on discovery, whether the vessel may have listed during loading, presumably to argue that, given the absence of cell guides at the lower end of the hold, a list would have permitted the containers to shift off the vessel's vertical alignment. Requests for inspection of the vessel's cell guides had been made but not fully fulfilled. ACL was either well aware of the relevance of vessel, her documents and computer system to these lines of inquiry, or could have, with reasonable diligence, been able to understand and ascertain same. This finding is corroborated by the correspondence addressed to the case management judge in August 2016 by counsel for ACL, in which he reports on behalf of all parties that:

> The parties recognize, and have discussed, the possibility that evidence still to be elicited from upcoming discoveries, and from responses to undertakings from earlier discoveries, may demonstrate the need for addition of the shipowner as a party to this litigation with possible attendant need for motion (s) to be made to the court to support such addition.

[25] ACL was in a position to secure, and should have secured the evidence and information necessary to protect its rights and interests before August 2016. I do not mean to suggest that ACL deliberately allowed the evidence to be destroyed. However, the fact that ACL did not take steps to secure evidence that was in the possession, care and control of the shipowner, when it knew or ought to have known that this evidence was potentially relevant to the litigation as

engaged and to possible recourses against the shipowner, shows that ACL would not have acted differently or taken additional measures to guard against the loss of the vessel had Ceres proposed its amendments earlier.

[26] The same goes for ACL's inability to now locate the vessel's Chief Officer. Furthermore, the record before me does not indicate when that witness ceased being employed by the crewing agency responsible for his presence on the vessel in 2013, or for how long following the end of his employment the crewing agency would have kept track of him. Access to that witness could therefore have been lost even before ACL commenced the present action.

[27] To the extent, therefore, the fortuitous loss of the vessel, of evidence carried on board or of a witness is prejudicial to ACL's ability to meet the proposed new allegations, I find that this prejudice would likely have occurred even if the proposed allegations had already been part of Ceres' initial pleadings. I should add that while the record before me suggests that evidence relevant to the issues raised in the proposed pleadings was likely lost with the vessel, it falls short of showing whether the loss of that evidence would have greater negative consequences on ACL's ability to defend itself or on Ceres or APM's ability to make their case.

[28] In the circumstances, I am satisfied that allowing the proposed amendments does not result in an injustice to ACL.

VI. Prejudice: Loss of a Recourse

[29] ACL argues that, had Ceres raised the alleged inherently substandard and dangerous arrangements of the cell guides in its original pleading, it could have sought indemnity from the shipowner, but that this recourse may now be time-barred.

[30] ACL chose not to implead or claim against the shipowner, even when it was aware that APM and Ceres were investigating the cell guide arrangements and their role in the incident. The August 2016 correspondence addressed to the Court by ACL's counsel, referred to above, also clearly shows that ACL was aware at that time that the implication of the shipowner remained possible. I am not persuaded that the course of conduct adopted by ACL, in failing to protect any right it might have had against the shipowner, resulted from the position taken by Ceres. I am not satisfied that ACL would have acted differently had Ceres raised its proposed new allegations earlier.

[31] Indeed, it is not entirely clear that ACL has a good recourse against the shipowner based on Ceres' new allegations. Ceres' proposed pleadings are to the effect that ACL should be held contributorily negligent because it knew or ought to have known of the vessel's substandard or dangerous configuration. The apparent nature of the allegedly faulty configuration and ACL's knowledge and acceptance of it are both essential to the success of Ceres' defence and possibly fatal to any claim ACL might have against the shipowner: Ceres can hardly claim that ACL was negligent for the faulty configuration of the ship if ACL was not or could not have been aware of it; it may be difficult for ACL to claim that the shipowner should indemnify it for that faulty

configuration if it accepted the vessel when the defect was or should have been apparent. This, rather than Ceres' failure to raise the faulty configuration earlier, may explain why ACL did not see fit to implead the shipowner earlier. In any event, ACL did not lead evidence to suggest that it relied on Ceres' failure to formally raise the issue in its pleadings in deciding not to protect any right it might have had against the shipowner.

[32] Finally, ACL has stopped short, in its materials and arguments before me on this motion, of establishing that any recourse it may have had against the shipowner is clearly time-barred, preferring instead to limits its submissions to the argument that these recourses "may" be time-barred.

[33] In the circumstances, I am not satisfied that Ceres' failure to raise the cell guides' configuration as grounds of contributory negligence caused ACL to forgo impleading or claiming against the shipowner, or that it is now difficult or impossible for it to do so.

ORDER

THIS COURT ORDERS that:

1. The motion of Cerescorp Company is granted.

2. Cerescorp Company has leave to serve and file, within 15 days of the date of this Order, an Amended Statement of Defence and Counterclaim in the form of the draft included in its moving motion record, provided that it also includes therein particulars of the ways in which it alleges that the arrangement of the bulkhead vertical cell guides and tank top spacing bars were substandard and inherently dangerous.

3. The costs of this motion shall be paid by Atlantic Container Lines to Cerescorp Company in any event of the cause, but the rights of Atlantic Container Lines to seek costs incurred as a reason of the amendments are reserved.

"Mireille Tabib"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-655-15
STYLE OF CAUSE:	ATLANTIC CONTAINER LINES AB v CERESCORP COMPANY AND APM TERMINAL GOTHENBURG AB
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DATED:	MAY 8, 2017

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