Federal Court  Cour fédérale

Date: 20140512

Docket: T-1444-09

Citation: 2014 FC 456

[UNREVISED CERTIFIED ENGLISH TRANSLATION]
Ottawa, Ontario, May 12, 2014

PRESENT: The Honourable Mr. Justice Harrington

ADMIRALTY ACTION *IN PERSONAM*

BETWEEN:

CAPITAINES PROPRIÉTAIRES DE LA GASPÉSIE (A.C.P.G.) INC. AND PAULIN COTTON AND AXA ASSURANCES INC.

**PLAINTIFFS/
DEFENDANTS BY COUNTERCLAIM**

and

PÊCHERIES GUY LAFLAMME INC. AND GUY LAFLAMME

**DEFENDANTS/
PLAINTIFFS BY COUNTERCLAIM**

JUDGMENT AND REASONS

[1] Monday, May 19, 2008, is a day that will be forever etched in the memory of Guy Laflamme. While his fishing boat, the *Myrana I*, was being launched with a portal crane, a mechanical problem occurred with the crane. A chain broke, the stern of the *Myrana I* fell into

the water, and 800 feet of cable came unwound from the crane, striking the boat and coiling around it. The *Myrana I* sustained damage from both the fall into the water and the crane cable.

[2] Capitaines Propriétaires de la Gaspésie (ACPG) was the owner of the portal crane. The crane was operated by a long-standing employee of ACPG, Paulin Cotton. Nothing of this sort had ever happened before.

[3] After the incident, Mr. Laflamme, whose company Pêcheries Guy Laflamme Inc. was the owner of the *Myrana I*, initiated discussions with ACPG with a view to reaching a settlement, without prejudice. These discussions were soon broken off because of the wide difference of opinion regarding the extent of the damage caused by the incident. Mr. Laflamme alleges that the damage exceeds $500,000, while ACPG is of the opinion that the damage is minimal and that most of the damage itemized in the claim is pre-existing damage.

[4] In response to the defendants' demand letter claiming $552,181.07 in damages, Axa Assurances Inc., the insurer of plaintiff ACPG, denied any liability. The plaintiffs took the position that ACPG and Mr. Cotton could not be held liable for the damage done when the *Myrana I* was launched because they are covered by an exclusion of liability clause in the contract.

[5] This brings us to the present action by which ACPG and Mr. Cotton are seeking a declaratory judgment that they are not liable to the defendants. Axa, too, is seeking a declaratory judgment, but to the effect that it had set up an insurance policy to cover ACPG's liability. Axa

did not insure the defendants against property loss and is not liable since ACPG and Mr. Cotton are not liable.

[6] In their defence against this action, the defendants are bringing a counterclaim against ACPG and Axa, but not against Mr. Cotton. They are claiming $408,277.05 in damages.

I. Issues

[7] This case raises the following issues:

a. What was the cause of the incident?

b. Did the incident occur because of the negligence of either ACPG or Mr. Cotton?

c. Is the exclusion clause in the contract broad enough to cover any negligence on the part of ACPG?

d. Is the exclusion clause broad enough to cover any negligence on the part of Mr. Cotton? If so, is he entitled to rely on this clause?

e. Was the exclusion clause brought to the defendants' attention? If not, were they or should they have been aware of it?

f. If yes, is the clause so abusive or draconian that the Court should refuse to enforce it?

II. Procedural history

[8] After the conclusion of oral arguments and the examination for discovery of Mr. Laflamme, the plaintiffs filed a motion for summary judgment. Justice Pinard denied the

motion, 2011 FC 2. Being of the opinion that the case raised issues of credibility, he found that it would be inappropriate for the Court to decide the matter on summary judgment. Issues of credibility were also raised at trial. Justice Pinard further concluded that the matter was governed by Canadian maritime law, not the *Civil Code of Québec*. In my view, the federal *Marine Insurance Act* applies on its own, but in any event, it is stipulated as the law governing the insurance contract.

[9] Then, on consent, Prothonotary Morneau issued a separate direction for determining the damages owed to the defendants/plaintiffs by counterclaim. The proceeding before me is therefore limited to the issue of liability.

III. Canadian maritime law

[10] Although maritime law has essentially been civil by nature since it concerns, among other things, collisions, salvage, general average, and incidents at sea (subsection 22(2) of the *Federal Courts Act*), for the purposes of this case, it will suffice to consider how that law has since developed, as summarized by the Supreme Court of Canada in *ITO-Int'l Terminal Operators v Miida Electronics*, [1986] 1 SCR 752, [*The Buenos Aires Maru*]. Canadian maritime law is federal law, not provincial law. It applies uniformly across the country and derives from the laws applied by the Admiralty Court in England.

[11] Justice McIntyre stated as follows, at page 779:

> It is my view, as set out above, that Canadian maritime law is a body of federal law encompassing the common law principles of tort, contract and bailment. I am also of the opinion that Canadian

> maritime law is uniform throughout Canada, a view also expressed by Le Dain J. in the Court of Appeal who applied the common law principles of bailment to resolve Miida's claim against ITO. Canadian maritime law is that body of law defined in s. 2 of the *Federal Court Act*. That law was the maritime law of England as it has been incorporated into Canadian law and it is not the law of any province of Canada.

[12] Marine insurance is a matter forming part of Canadian maritime law (*Zavarovalna Skupnost Triglav (Insurance Community Triglav Ltd.) v Terrasses Jewellers Inc*, [1983] 1 SCR 283).

IV. Background

[13] Since 1984, ACPG has operated a marina and a dry dock in Rivière-au-Renard, Quebec. Fishing boats are put into storage or launched here using a portal crane. To launch a boat, as was the case here, the crane straddles the boat so that its wheels surround it, and its cable slings are placed under the boat, which is then lifted and lowered into the water in the opening in the launching dock.

[14] The crane in issue had been purchased new in 1984, and Mr. Cotton had operated it without incident for 24 years.

[15] ACPG, now an authorized capital company, is, as its name indicates, an association of fishing boat captains and owners in the Gaspé region. It has 55 shareholders. Mr. Laflamme is one of those shareholders.

[16] This association has a dual purpose. It lobbies the Department of Fisheries and Oceans, as well as other agencies, on matters relating to fishing rights and quotas, and uses its combined buying power to obtain better prices on ice and other goods that its members need.

[17] Before 1984, the marina was operated by others, including Quebec's Ministère de l'Agriculture. ACPG inherited a model contract entitled [TRANSLATION] "Boat Handling". Apart from putting its own name on this document and placing more emphasis on removing any waste from where a fishing boat was stored, ACPG made no changes to it. It is a one-page document in very legible type. The first part is an authorization to carry out certain operations, such as towage, launching, wintering and docking, or to provide other services. The costs of these individual services are set out in a column on the right-hand side.

[18] The second part is entitled [TRANSLATION] "Boat Owner's Responsibilities". It is written in capital letters, in bold type. It contains only three paragraphs. The first paragraph reads as follows:

> [TRANSLATION]
> I, the undersigned, ____, residing at ____, owner of the vessel M/V ____, registration number ____, declare that I accept liability for any risk resulting from the towage, docking, wintering and/or launching of this vessel, and I release the Owner of this dry dock and its Operator, ____, from any civil liability resulting from these associated operations or handling.

The other two parties are not relevant in this case.

[19] I am satisfied that Mr. Cotton filled out the [TRANSLATION] "Launch" section of the form that same day, before any services were rendered. The cost was $400, plus taxes. He gave

[TRANSLATION] "Guy Laflamme, residing at Rivière-au-Renard", as owner of the *Myrana I*, and "Paulin Cotton" as the operator.

[20] Guy Laflamme signed the form as [TRANSLATION] "owner or authorized representative of the vessel", and Paulin Cotton witnessed the document as [TRANSLATION] "operator or authorized representative of the dock".

[21] This sort of document was nothing new to Mr. Laflamme. He had been signing the document since becoming the owner of the vessel in 1988 or 1989. He had signed it at least 16 times.

V. Cause of the incident

[22] In short, the cause of the incident is unknown. The defendants allege that the crane was not being maintained as it should have been, since the crane was in the process of being sold. I, however, am of the opinion that, based on the testimony of Mr. Cotton and on the various invoices filed, Mr. Cotton followed the instructions in the operating and maintenance manual. Subcontractors checked the hydraulics system and the propulsion system. Notwithstanding this, no government or independent third-party inspection was ever made. This points to metal fatigue in the chain as the suspected cause. No chain had ever broken like this before.

[23] The defendants made much of the possibly contradictory testimony that Mr. Cotton gave at trial and at his examination for discovery regarding the red thread in the sling. If the red thread is visible, the sling must be replaced. At his examination for discovery, Mr. Cotton did not have the operating and maintenance manual with him. He talked about replacing the slings when the red thread broke. At any rate, I am satisfied that the failure of the sling on May 19, 2008, was due to the launching of the boat. The sling was not the cause of the incident.

VI. Was there negligence on the part of ACPG or Mr. Cotton?

[24] It is not enough that the plaintiffs cannot explain the cause of the loss. The portal crane was in the possession and under the control of ACPG and Mr. Cotton. The onus is on the plaintiffs, as bailees, to prove that the loss was not caused by a breach of their duty of reasonable care (*The "Ruapehu"* (1925), 21 L1 LR 310; *McCreary v Therrien Construction Co*, [1951] OR

735 (Ont CA); [1952] 1 DLR 153; *National Trust Co Ltd v Wong Aviation Ltd et al*, [1969] SCR 481; *Mercury Launch & Tug Ltd v Texada Quarrying Ltd*, 2006 FC 464). Neither ACPG nor Mr. Cotton rebutted this presumption of negligence.

VII. Scope of the exclusion clause

[25] I am satisfied that the exclusion clause, on its plain wording, is broad enough in scope to cover any such negligence, be it in contract or in tort, as there may have been on the part of ACPG or Mr. Cotton.

[26] The defendants stress that the exclusion clause does not explicitly exclude negligence or fault. They rely on a number of decisions, including *Canada Steamship Lines Ltd v The King*, [1952] UKPC 1, [1952] AC 192; and *Canadian Pacific Forest Products Ltd v Belships (Far East) Shipping (Pte) Ltd*, [1999] 4 FC 320 (FCA), [1999] FCJ No. 938 (QL). These decisions establish that if liability may be based on some ground other than negligence, liability for negligence is not excluded unless it is expressly excluded.

[27] *Belships* can be distinguished from the present case by the fact that, although the clause in question in that case did not mention "negligence", two others did. The presumption laid down in that case is that it would be unreasonable for one party to the contract to waive its right to institute an action in damages for the harm caused by the negligence of the other party. However, the courts have increasingly distanced themselves from this principle. In *Tercon Contractors Ltd v British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 SCR 69, the province

"issued a request for expressions of interest . . . for designing and building a highway". The request for proposals included an exclusion clause that reads as follows:

> Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a Proposal each Proponent shall be deemed to have agreed that it has no claim.

[28] Although the Court came to a split decision (five to four) with regard to the interpretation of the exclusion clause, the majority concurred with the analysis of Justice Binnie regarding fundamental breach as a common law concept. Justice Binnie wrote the following at paragraph 82:

> . . . Rather, the principle is that a court has no discretion to refuse to enforce a valid and applicable contractual exclusion clause unless the plaintiff . . . can point to some paramount consideration of public policy sufficient to override the public interest in freedom of contact [*sic*] and defeat what would otherwise be the contractual rights of the parties. . . . There is nothing inherently unreasonable about exclusion clauses. . . .

He added, at paragraph 102, that there are many valid reasons for contracting parties to use exemption clauses, most notably to allocate risks.

[29] I am persuaded that the following statement in the contract entitled [TRANSLATION] "Boat Handling", namely, [TRANSLATION] " . . . I release the Owner of this dry dock and its Operator, Paulin Cotton, from any civil liability resulting from these associated operations or handling", is sufficiently broad to exempt ACPG and Mr. Cotton from any liability resulting from negligence.

[30] I deduce that the contract was entered into by ACPG and Pêcheries Guy Laflamme Inc. Mr. Laflamme signed it as the company's representative, without being personally liable for paying the bills. The issue is whether the exclusion clause exempts ACPG and Mr. Cotton from liability with regard to a loss personally sustained by Mr. Laflamme.

[31] First of all, Mr. Laflamme is named as defendant. Second, he is a plaintiff by counterclaim, as is the company. However, he does not claim to have suffered a personal loss. The counterclaim states:

> [TRANSLATION]
>
> 26. The plaintiff by counterclaim is a company specializing in fishing, as will be shown at the hearing;
>
> 36. Guy Laflamme is the boat's operator (captain), is the president of the company Pêcheries Guy Laflamme Inc. and is a member of the Association des Capitaines de la Gaspésie (ACPG), as will be shown at the hearing;

[32] If Mr. Laflamme suffered a loss, it was the loss of his share in the last catch of the fishery, and perhaps even the loss of dividends from his company. It would therefore be a question of compensation for purely economic loss in tort, which is something that cannot be claimed in Canadian maritime law. Moreover, Mr. Laflamme should have been aware of the ACPG's business conditions.

VIII. Does the exclusion clause benefit Mr. Cotton?

[33] The clause is certainly sufficiently broad in scope to cover any liability on the part of Mr. Cotton. He is expressly named in the contract. Canadian maritime law, like Quebec civil

law, recognizes stipulations for another (*The Buenos Aires Maru*, above; *London Drugs Ltd v Kuehne & Nagel International Ltd*, [1992] 3 SCR 299; and *Fraser River Pile & Dredge Ltd v Can-Dive Services Ltd*, [1999] 3 SCR 108).

[34] Therefore, even though Mr. Cotton was not a party to the contract, he is entitled to rely on the exclusion clause.

IX. Promulgation of the exclusion clause

[35] Mr. Cotton attests that he brings the contract clauses to the attention of everyone who uses ACPG's services, whether they are shareholders or not. Although he states that he does it the first time, he admits that he does not always do so after that, but says that he draws special attention to the [TRANSLATION] "Waste" section of the contract.

[36] Mr. Laflamme is adamant that the wording of the contract was never brought to his attention. He says that he has difficulty reading and never read the entire contract. He thought it was just an invoice.

[37] The form is drawn up in triplicate. The first copy is given to the signing party, the second is sent to the recipient of the services as an invoice, and the third is kept.

[38] Denis Servant, a maritime expert for several different insurers, is the only other user of ACPG's services who testified. Generally, when marine accidents occur, he brings the boats to ACPG's facilities to have them placed in dry dock. Normally, arrangements in this regard are

made with Mr. Cotton. No document is signed at that time. Mr. Cotton simply asks where to send the invoice, although Mr. Servant also receives a copy of it for the insurer. No copy of any such invoice was filed. He added that Mr. Cotton had not given any special notice in this regard.

[39] I find that, if Mr. Cotton did indeed explicitly draw Mr. Laflamme's attention to the exclusion clause, it was about 20 years prior to the incident. Moreover, I think that it is wishful thinking on the part of Mr. Cotton and Mr. Laflamme. However, there is no need for the Court to make a finding on this point.

[40] Pêcheries Guy Laflamme Inc. should have been aware of the clause because a copy of the contract entitled [TRANSLATION] "Boat Handling" and containing the exclusion clause was sent to the company after each boat handling operation and account payment. Until 2002, the company's administrative tasks, including the bookkeeping, were performed by Mr. Laflamme's *de facto* spouse. Afterwards, it was Francine, Mr. Laflamme's sister, a teacher for approximately 34 years until her retirement in 2005, who took over. She was able to find 36 [TRANSLATION] "Boat Handling" contracts in the company files, but she stated that there could be others. Out of the 36 contracts found, 16 were signed by Mr. Laflamme as boat owner or as authorized representative, 3 were signed by Mr. Cotton as authorized representative, 1 was signed by Gildas Cotton, and the others were not signed on behalf of the owner.

[41] Ms. Laflamme testified that she thought that forms entitled [TRANSLATION] "Boat Handling" were just invoices and that she never read their contents. All the invoices, whether or not they were signed by Mr. Laflamme, were paid without complaint.

[42] I find it totally unacceptable that Mr. Laflamme, an experienced businessman who incorporated the *Myrana I* and took out a hull and machinery insurance policy covering this boat, never told Mr. Cotton that he could not read, or that he had great difficulty reading.

[43] ACPG was entitled to expect there to have been a meeting of the minds between the parties regarding the conditions according to which the work would be performed. Indeed, since the incident, the parties have continued to do business together. Mr. Laflamme proposed that he not sign the [TRANSLATION] "Boat Handling" contract until this litigation is finally resolved. ACPG turned down this proposal. Mr. Laflamme continued to sign the form, knowing full well what is in it.

[44] A company owes its existence to the law; it is a legal person that exists on paper and that frequently has to deal with documents. It is unacceptable for a company to take the position that it cannot read!

[45] The defendants rely heavily on the decision of the Ontario Court of Appeal in *Tilden Rent-A-Car Co v Clendenning*, 18 OR (2d) 601, 83 DLR (3d) 400, [1978] OJ No 3260 (QL), a case that is not always well regarded. Mr. Clendenning had rented cars many times from Tilden at airports. He had never read the contract but had stated that he wanted additional coverage. The issue was whether, since there was an exclusion clause in the contract, he was liable for damage caused to the car while he was driving it.

[46] The Court concluded that the clause in question was entirely inconsistent with the terms, which said that they offered full coverage for an additional premium. The Court also concluded that transactions like this one had been done informally and in haste.

[47] The present case is very different. Not only did Mr. Laflamme have 20 years to read this one-page document, but the contract contains no subtle points that are inconsistent with the overall purpose of the contract.

[48] The underlying principle is an objective theory of contractual principles according to which the parties are bound by a contract on the basis of what is objectively observed by a third party. It is therefore presumed that a party that signs a contract is bound by the terms of said contract.

[49] Justice Dubin, writing on behalf of the majority, stated as follows in *Tilden*:

> 20 In ordinary commercial practice where there is frequently a sense of formality in the transaction, and where there is a full opportunity for the parties to consider the terms of the proposed contract submitted for signature, it might well be safe to assume that the party who attaches his signature to the contract intends by so doing to acknowledge his acquiescence to its terms, and that the other party entered into the contract upon that belief. This can hardly be said, however, where the contract is entered into in circumstances such as were present in this case.
>
> 21 A transaction, such as this one, is invariably carried out in a hurried, informal manner. The speed with which the transaction is completed is said to be one of the attractive features of the services provided.
>
> 22 The clauses relied on in this case, as I have already stated, are inconsistent with the over-all purpose for which the contract is entered into by the hirer. Under such circumstances, something

> more should be done by the party submitting the contract for signature than merely handing it over to be signed.

[50] The decision of Justice Lederman in *Davis v Robertson*, [2000] OJ No 1712 (QL), is even more relevant. At paragraph 14, he states:

> As to whether the plaintiffs had their attention sufficiently drawn to the exclusion of liability clause, it should be noted that the Waiver was quite short in length; bolding and capitals were used; a signature was required; there was no need to sign and return the Waiver in a hurried manner; and the Waiver was not a new component in the Boating Club's storage arrangements. Thus, it would be difficult to accept an argument that the plaintiffs would not have been aware of the existence and purpose of the Waiver.

X. Is the clause abusive or draconian?

[51] The answer can be found in the preceding analysis. Risk-allocation clauses are typical of business today. As such, they are neither abusive nor draconian.

[52] Mr. Laflamme, who paid little attention to ACPG's activities, was vaguely aware that ACPG had insurance coverage. Since the company [TRANSLATION] "was always there" for its members, he assumed that the insurance covered at the very least ACPG's liability to its members. However, he never inquired about this and deliberately refrained from reading the [TRANSLATION] "Boat Handling" contract, which was completely at odds with what he assumed it to be.

[53] The fact that the insurers did not insist that this clause be incorporated into the contract, and that this appears to have had no impact on the premium, is not relevant.

[54] Indeed, Mr. Couillard, the acting general manager at the time of the incident, who is also Mr. Laflamme's cousin, testified that some fishing boats that the marina takes care of are more expensive than others. Presumably, they are covered by their own hull and machinery insurance.

[55] Pêcheries Guy Laflamme Inc. did indeed have such hull and machinery coverage. However, as Francine, Mr. Laflamme's sister, testified, this insurance had been cancelled the year before the incident because she had forgotten to pay the premium. Faced with a clause that

excludes or limits liability, one can always take out insurance (*Barzelex Inc v EBN Al Waleed (The)*, [1999] FCJ No 1839 (QL)).

JUDGMENT

FOR THE REASONS SET OUT ABOVE,

THIS COURT'S JUDGMENT is that:

1. The action is allowed;

2. The exclusion of liability clause in the contract between the parties is valid, in effect and enforceable against Pêcheries Guy Laflamme Inc. and Guy Laflamme;

3. The counterclaim is dismissed;

4. With costs to the plaintiffs/defendants by counterclaim.

"Sean Harrington"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1444-09
STYLE OF CAUSE:	CAPITAINES PROPRIÉTAIRES DE LA GASPÉSIE (A.C.P.G.) INC. ET AL v PÊCHERIES GUY LAFLAMME INC. ET AL
PLACE OF HEARING:	GASPÉ, QUEBEC
DATES OF HEARING:	MARCH 24–26, 2014
JUDGMENT AND REASONS:	HARRINGTON J.
DATED:	MAY 12, 2014

APPEARANCES:

Jean-François Bilodeau	PLAINTIFFS / DEFENDANTS BY COUNTERCLAIM
Sarto Landry	DEFENDANTS / PLAINTIFFS BY COUNTERCLAIM

SOLICITORS OF RECORD:

Robinson Sheppard Shapiro, SENCRL Advocates Montréal, Quebec	PLAINTIFFS / DEFENDANTS BY COUNTERCLAIM
Sarto Landry Advocate Québec, Quebec	DEFENDANTS / PLAINTIFFS BY COUNTERCLAIM