Federal Court  Cour fédérale

Date: 20160422

Docket: T-940-13

Citation: 2016 FC 461

Ottawa, Ontario, April 22, 2016

PRESENT: The Honourable Madam Justice Heneghan

ADMIRALTY ACTION *IN REM* AND *IN PERSONAM*

BETWEEN:

AGF STEEL INC.

Plaintiff

and

MILLER SHIPPING LIMITED, MIDNIGHT MARINE LIMITED, THE TUG "WESTERN TUGGER", THE OWNERS AND ALL OTHERS INTERESTED IN THE TUG "WESTERN TUGGER", THE BARGE "ARCTIC LIFT 1", THE OWNERS AND ALL OTHERS INTERESTED IN THE BARGE "ARCTIC LIFT 1", THE TUG "NORTHERN TUGGER", THE OWNERS AND ALL OTHERS INTERESTED IN THE TUG "NORTHERN TUGGER", THE BARGE "LABLIFT", THE OWNERS AND ALL OTHERS INTERESTED IN THE BARGE "LABLIFT", AND MARINE SERVICES INTERNATIONAL (2008) LTD.

Defendants

and

MILLER SHIPPING LIMITED

Third Party

AND BETWEEN:

MILLER SHIPPING LIMITED AND MIDNIGHT MARINE LIMITED

Plaintiffs By Counterclaim

and

AGF STEEL INC. AND MARINE SERVICES INTERNATIONAL (2008) LTD.

Defendants By Counterclaim

REASONS FOR JUDGMENT

I. INTRODUCTION

[1] Miller Shipping Limited ("Miller Shipping") and Midnight Marine Limited (Midnight Marine") (collectively, the "Miller Defendants" or the "Moving Parties") seek summary judgment against AGF Steel Inc. ("AGF" or the "Plaintiff"), pursuant to the *Federal Courts Rules*, SOR/98-106 (the "Rules"), that they are not liable for the loss of steel rebar cargo, owned by AGF, on or about May 10, 2013, off the south coast of Newfoundland and Labrador.

[2] Marine Services International (2008) Ltd. ("MSI") did not file its own motion for summary judgment but seeks the benefit of the judgment if the Miller Defendants succeed in their motion.

II. THE PARTIES

[3] AGF is a body corporate engaged in the business of producing and supplying steel products.

[4] Miller Shipping is a body corporate operating in Newfoundland and Labrador, and engaged in the business of specialized marine cargo transportation.

[5] Midnight Marine is a body corporate operating in Newfoundland and Labrador. It is the owner of all the Defendant ships and owns the assets used by Miller Shipping.

[6] Miller Shipping and Midnight Marine are related companies; the shares of each corporation are held by a common holding company, Miller Holdings Limited.

[7] MSI is a body corporate, with its registered office in St. John's, Newfoundland and Labrador. It provides marine surveying services, including cargo load and stowage surveys. It was a subcontractor of Miller Shipping relative to the transportation of the Plaintiff's cargo.

III. PROCEDURAL BACKGROUND

[8] The Plaintiff filed its Statement of Claim on May 27, 2013, against Miller Shipping, Midnight Marine, the tug "Western Tugger", the owners and all others interested in the tug "Western Tugger", the barge "Arctic Lift 1" and the owners and all others interested in the barge "Arctic Lift 1".

[9] Warrants were issued for the arrest of several vessels owned by Midnight Marine. As of the date of the hearing of this motion, the tug "Western Tugger" and the barge "Arctic Lift 1" had been released from arrest.

[10] The Statement of Claim was amended several times. Further to an Order of Prothonotary Morneau dated March 5, 2015, the Plaintiff filed a Re-re-amended Statement of Claim on March 11, 2015, adding MSI as a Defendant.

[11] In its Re-re-amended Statement of Claim, AGF seeks the following relief:

> a) the Defendants be condemned jointly and severally to pay Plaintiff the amount of CDN $8,376,252.88, subject to reassessment;
>
> b) pre-judgment and post-judgment interest on the aforesaid amount at the prime commercial rate compounded annually, from the date of the loss of the shipment;
>
> c) for condemnation of the Defendants tug, "Western Tugger", barge "Arctic Lift 1", tug "Northern Tugger", and barge "Lablift" *in rem* and for an order that the same be judicially sold to satisfy Plaintiff's claim in principal, interest and costs;
>
> d) the costs of this action together with the costs of investigation, expertise and reports; and
>
> e) such further and other relief as this case may require.

[12] Midnight Marine, Miller Shipping and the Defendant ships filed a Statement of Defence on June 27, 2013, an Amended Defence on July 14, 2014, and a Further Amended Defence on April 7, 2015.

[13] MSI filed its Statement of Defence on April 23, 2015 and an Amended Statement of Defence on August 25, 2015.

[14] On August 25, 2015, MSI filed a Third Party Claim against Miller Shipping. Miller Shipping filed a Statement of Defence to the Third Party Claim on September 16, 2015.

[15] The Miller Defendants filed a Counterclaim against AGF and MSI on September 16, 2015. AGF filed its Statement of Defence to the Counterclaim on October 8, 2015. MSI filed its Statement of Defence to the Counterclaim on October 30, 2015.

IV. EVIDENCE

[16] In support of their motion, the Miller Defendants filed the Affidavit of Patrick Miller, sworn on April 2, 2015. Mr. Miller is the President of Miller Shipping and Midnight Marine.

[17] In response to this motion, AGF filed the Affidavit of Mr. Pierre Colangelo, Procurement Manager for AGF, sworn on May 29, 2015, the transcript of the examination for discovery of Mr. Miller, and the transcript of the cross-examination of Mr. Miller on his affidavit. Mr. Miller was examined on behalf of both the Plaintiff and MSI.

[18] MSI filed the transcript of the cross-examination of Mr. Colangelo on his affidavit.

V. BACKGROUND

[19] The following facts are derived from the affidavits and cross-examination transcripts filed.

[20] In early September 2012, Miller Shipping learned of an opportunity to provide marine transportation services for AGF, to transport steel rebar from Sorel, Québec to Long Pond, Newfoundland and Labrador. This potential business came to the attention of Mr. Miller. On September 6, 2012, Miller Shipping submitted a proposal offering tug and barge services using the tug "Western Tugger" and the barge "Arctic Lift 1". This proposal did not include stevedoring services.

[21] Mr. Miller and Mr. Colangelo met on September 7, 2012 to discuss the business proposal. Mr. Colangelo requested an updated proposal which would include a "key in hand" solution, that is delivery of the cargo to the docks, stevedoring services and delivery of the cargo to its final destination.

[22] Mr. Miller submitted a revised proposal on September 10, 2012. This proposal contemplated the transportation of 43,000 metric tonnes of steel rebar using the "Western Tugger" and "Arctic Lift 1". Mr. Miller and Mr. Colangelo discussed the proposal and negotiated a rate of $93.00 per metric tonne. This proposal did not address cargo or liability insurance or allocation of risk.

[23] The September 10 proposal included vessel specifications which incorrectly listed Miller Shipping as the owner of the "Arctic Lift 1". It also stated the cargo capacity of the barge is "7,500 tons".

[24] In the course of negotiations, which occurred between September 7, 2012 and September 18, 2012, AGF asked Miller Shipping to provide a recent marine survey of the two vessels and to "confirm that they had adequate insurance". Miller Shipping supplied the requested documentation.

[25] Miller Shipping and AGF entered into a contract (the "Contract") on the basis of the September 10th proposal. The Contract was signed by Mr. Miller on September 18, 2012 and by Mr. Colangelo on October 3, 2012. The Contract provided for the transportation of 43,000 metric tonnes of steel rebar, over six voyages, between October 2012 and April 2013.

[26] AGF obtained insurance to cover the risk of loss or damage to its cargo as required by Clause 19.5 of the Contract. Miller Shipping obtained Hull and Machinery insurance and Protection and Indemnity insurance as required by Clause 19.1 of the Contract.

[27] The Contract was partially performed. Two successful voyages were made in October 2012 and December 2012. MSI conducted surveys of the cargo securing arrangements before these two voyages commenced. Copies of these reports were provided to AGF by Miller Shipping.

[28] Between April 28, 2013 and May 2, 2013, 7,095.179 metric tonnes of steel rebar were loaded on the "Arctic Lift 1" at Sorel, Québec by Québec Stevedoring Ltd., a sub-contractor of Miller Shipping. On May 2, 2013, MSI completed a "Cargo Loading and Stowage Survey" of the "Arctic Lift 1". It concluded that the cargo was properly stowed and secured prior to departure.

[29] On May 10, 2013 at 6:40 a.m., the barge capsized on the south coast of Newfoundland and Labrador, with the loss of the entire cargo.

[30] The cause of the loss is disputed by the parties. The Plaintiff alleges the loss was caused by the fact that the barge was loaded in excess of its capacity. It claims the carrying capacity of the barge is 7,500 short tons, that is 6,803. 885 metric tonnes. The Moving Parties and MSI deny that the barge was overloaded.

[31] Clause 18.2 of the Contract is relevant to this motion and provides as follows:

> 18.2 Contractor and Charterer agree that each party shall, with respect to:
>
> (i) its own officers, employees, servants, invitees, agents and contractors,
>
> (ii) the property of its own officers, employees, servants, invitees, agents and contractors.
>
> (iii) its own property (which for the avoidance of doubt includes any owned or leased marine vessel, the Vessel, or equipment used by or on behalf of Contractor in performance of the Services and excluded any cargo stowed and secured by Contractor) or property of any person or company who is a party to a contract with it;
>
> (a) be liable for all losses, costs, damages, expenses and legal expenses whatsoever which it may suffer, sustain, pay or incur, directly or indirectly arising from or in connection with this contract on account of bodily injury to or death of such persons or

> damage to such persons or loss of or damage to such property; and in addition; and
>
> (b) defend, indemnify and hold harmless the other party against all actions, proceedings, claims, demands, losses, costs, damages, expenses and legal expenses whatsoever which may be brought against or suffered by the other party to this Charter or which the other party to this Charter may sustain, pay, or incur, directly or indirectly arising from or in connection with the Charter on account of bodily injury to or death of such persons or damage to such persons or loss of or damage to such property.
>
> This liability and indemnity shall apply without limit and without regard to cause or causes, including without limitations, the negligence, whether sole, concurrent, gross, active, passive, primary or secondary, or the willful act or omission, of either party to this Charter or any other person otherwise.

[32] Clause 19.5 is also relevant to this motion and provides as follows:

> 19.5 Charterer shall provide Marine Cargo insurance covering "all risks" of physical loss or damage subject to policy exclusions, and a deductible with limits as are satisfactory to the Charterer. It is understood that this Charter Party is for the purpose of moving Charterers rebar cargoes in the Maritimes; furthermore, Contractor loads/unloads the respective cargo.

VI. SUBMISSIONS

A. *The Submissions of the Miller Defendants*

[33] The Miller Defendants submit that the terms of the Contract with the Plaintiff exclude liability in contract and in tort on their part**.** Consequently, no genuine issue for trial is raised and summary judgment should be granted pursuant to Rule 215 of the Rules.

[34] The Miller Defendants argue, first, that the Contract is a charterparty and not a "contract for the carriage are goods by water" within the scope of subsection 43(2) of the *Marine Liability*

Act, S.C. 2001, c. 6 (the "Act"). In support of this argument, they rely upon the decisions in *T. Co. Metals L.L.C. v. Federal EMS (Vessel)*, [2014] 1 F.C.R. 836 (F.C.A.) at paragraphs 76-80 and *Wells Fargo Equipment Finance Co. v. Barge "MLT-3" (The)* (2013), 359 D.L.R. (4th) 561 at paragraphs 33, 36-40.

[35] Subsection 43(2) of the Act provides as follows:

43(2) The Hague-Visby Rules also apply 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.	(2) Les règles de La Haye-Visby s'appliquent également aux contrats de transport de marchandises par eau d'un lieu au Canada à un autre lieu au Canada, directement ou en passant par un lieu situé à l'extérieur du Canada, à moins qu'ils ne soient pas assortis d'un connaissement et qu'ils stipulent que les règles ne s'appliquent pas.

[36] The Miller Defendants further submit that the language of the Contract shows that the Contract is a charterparty, referring to the introductory paragraph and Clauses 3.0, 4.1 and 8.1. They also argue that the Contract is for the hire of a ship, the principal attribute of a charterparty. No bill of lading was issued in this case with respect to the cargo.

[37] The Miller Defendants submit that since the Contract is a charterparty, it is exempt from the application of the *Hague-Visby Rules*, being Schedule 3 of the Act ("Hague-Visby Rules"), and that issues of liability are to be determined according to the terms of the Contract.

[38] The Miller Defendants argue that Clauses 18.2 and 19.5 of the Contract exclude the liability of Miller Shipping for the loss of the cargo. They characterize Clause 18.2 as a "knock for knock" risk allocation agreement by which each party agreed to bear the risk of loss or damage to its own property.

[39] The Miller Defendants submit that the contracting parties are sophisticated commercial entities that should be held to their bargains. Exclusion of liability clauses that are freely negotiated should be enforced unless there is an overriding public policy consideration that displaces the public interest in the freedom of contract.

[40] In this regard, the Miller Defendants rely upon the decision in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, [2010] 1 S.C.R. 69 at paragraphs 62 and 82. They argue that the Plaintiff agreed, pursuant to Clause 18.2, to bear all risks of loss or damage to its own property and as such, the Clause operates to exclude the liability of Miller Shipping.

[41] The Moving Parties also rely upon the decision of the Admiralty Division of the English and Wales High Court, *A Turtle Offshore S.A. v. Superior Trading Inc.*, [2009] 1 Llyod's Rep. 177 at paragraphs 105, 107, 112 where a similar clause was in issue. In that case, the Court found that the commercial purpose of that clause was to spell out to the parties which of them was to bear the risk of loss.

[42] The Miller Defendants then argue that Clause 19.5 likewise excludes the liability of Miller Shipping for the loss of the cargo. Clause 19.5 is an undertaking by the Plaintiff to insure the cargo.

[43] According to the Miller Defendants, a contractual undertaking to insure has the effect of relieving the beneficiary of the undertaking from liability for loss or damage of the property. They rely on the decisions in *St. Lawrence Cement Inc. v. Wakeham & Sons Ltd.* (1995), 26 O.R. (3d) 321 (Ont. C.A.) and *De Beers Canada Inc. v. Ootahpan Company Limited*, 2014 ONCA 723.

[44] The Moving Parties further argue that the Contract excludes the liability of Midnight Marine for the loss of the cargo. In this regard, the Miller Defendants submit that since the Hague-Visby Rules do not apply to the Contract, the definition of "carrier" in Article 1(a) of those Rules, which includes "owner", does not apply.

[45] The Miller Defendants submit that Canadian jurisprudence provides that either the charterer or the ship owner is the "carrier", but not both. They argue that the identity of the carrier is determined by who enters into the contract of carriage with the shipper, relying on the decisions in *Union Carbide Corporation et al v. Fednav Ltd.*(1997), 131 F.T.R. 241 (F.C.T.D.) and *Jian Sheng Co. v. Great Tempo S.A.*, [1998] 3 F.C.R. 418 (F.C.A.).

[46] They contend that, pursuant to the Contract, Miller Shipping is the contractual carrier. The Miller Defendants submit that Midnight Marine is neither a carrier nor a party to the

Contract, consequently its alleged liability must lie in tort. They argue that Clause 18.2 expressly excludes liability for the negligence of other parties.

[47] In these circumstances, the Moving Parties submit that Midnight Marine is an express third party beneficiary of the exemptions of liability provided in the Contract. They say that Midnight Marine is an "other person" referred to in Clause 18.2 or, alternatively, it is an "affiliate" and "contractor" of Miller Shipping.

[48] Relying on the decision of the Nova Scotia Court of Appeal in *Orlandello v. Nova Scotia (Attorney General)* (2005), 234 N.S.R. (2d) 247, the Miller Defendants argue that a promise not to sue an unnamed third party is enforceable by the third party.

[49] The Miller Defendants submit that in Clause 6.13, Miller Shipping accepted complete responsibility for its agents and contractors, and as such Midnight Marine had no responsibility or liability to AGF. Pursuant to Clause 1.2(i)(c), Midnight Marine is a "contractor" within the meaning of Clause 6.13.

[50] Clause 6.13 provides as follows:

> 6.13 Contractor is an independent contractor and nothing contained herein shall be constructed as constituting any other relationship with Charterer, nor shall it be construed as creating any relationships whatsoever between Charterer and Contractor's employees. Further, Contractor accepts complete responsibility as a principal for its agents and contractors.

[51] The Miller Defendants argue that the Contract must be read as a whole and considering the text of Clauses 18.1 and 18.2, it would be absurd to interpret the Contract other than as providing express exclusions of liability to affiliates of the Plaintiff and Miller Shipping.

[52] In the alternative, the Miller Defendants submit that Midnight Marine is an implied third party beneficiary of the liability exclusions in Clauses 18.2 and 19.5. They rely here upon the decisions in *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299 and *Fraser Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108. These authorities establish that the doctrine of privity of contract will be relaxed where the contracting parties intended that the contract confer a benefit on the third party and the loss occurred while the third party was performing the very acts contemplated by the contract.

[53] The Miller Defendants argue that in negotiating the Contract, the parties intended to benefit the ship owner as a third party beneficiary.

[54] The Moving Parties submit that, despite the fact that the proposal dated September 10, 2012 incorrectly identified Miller Shipping as the owner of the barge "Arctic Lift 1", the Plaintiff had actual knowledge that both the tug and the barge were owned by Midnight Marine, as stated in the reports of the load surveys provided to the Plaintiff following the first and second voyages in October and December 2012.

[55] The Miller Defendants argue that at the time of the loss, the tug and barge, owned by Midnight Marine, were providing the "very activity" contemplated by the Contract. They submit

that the Contract meets the criteria set out in *London Drugs*, *supra* and *Fraser Dredge*, *supra*, so as to confer the benefit of Clauses 18.2 and 19.5 on Midnight Marine.

[56] The Miller Defendants submit that since Midnight Marine, owner of the Defendant ships, is not liable for the loss of the cargo, there is no right to proceed *in rem* against any of the ships. They rely upon the decision in *Mount Royal Walsh Inc. v. "Jensen Star" (The)* (1989), 99 N.R. 42 (F.C.A.) in support of this argument.

B. *The Submissions of the Plaintiff*

[57] The Plaintiff submits that the Miller Defendants' motion for summary judgment should be dismissed on the ground that the issues cannot be properly determined on a summary basis. It argues that a large volume of evidence is yet to be tendered and the cost of a trial is relatively low, considering the amount of damages sought, that is $8,376,252.88. As well, it submits that no prejudice would accrue to the parties from waiting for a final disposition by way of trial.

[58] The Plaintiff also argues that the outcome of the action largely depends upon the interpretation of the Contract and that the Contract should be adjudicated in light of the surrounding circumstances, considering the intentions of the parties.

[59] In this regard, AGF relies upon the decision in *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 S.C.R. 633. In particular, it submits that the more general the clause concerning release of liability, the more important is the factual matrix, relying on the decision in *Wood*

Buffalo Housing & Development Corp. v. Flett (2014), 596 A.R. 180 at paragraph 71 (Alta. Q.B.).

[60] The Plaintiff also submits that Miller Shipping acted unconscionably by entering into a contract for the carriage of goods which exceeded the weight limitations of the barge. It argues that this issue cannot be determined on the basis of a summary judgment motion.

[61] Finally, the Plaintiff argues that the determination of negligence requires a trial and should not be disposed of on a motion, referring to the decisions in *John Forsyth Shirt Company v. The Savage Holding Inc.*, [2009] O.J. No. 4678 (Ont. Sup. Ct. J.) and *B.C. Rail Partnership v. Standard Car Truck Co. et al.* (2009), 282 N.S.R. (2d) 112 (N.S.S.C.).

[62] On the issue as to the application of the Hague-Visby Rules, the Plaintiff submits that the Contract is a contract of carriage of by water which, pursuant to subsection 43(2) of the Act, is subject to those Rules.

[63] While acknowledging that no bill of lading was issued for the cargo, the Plaintiff argues that the absence of such a document does not mean that subsection 43(2) of the Act does not apply. That provision requires both that no bill of lading exists and that the Contract stipulates that the Hague-Visby Rules do not apply.

[64] The Plaintiff states that the Contract does not mention or reference the Hague-Visby Rules and consequently, those Rules apply.

[65] Turning to the Contract, the Plaintiff argues that the definition of "property" in Clause 18.2 specifically excludes the cargo from the ambit of that clause and accordingly, the Miller Defendants cannot rely upon that clause to relieve them of liability for the lost cargo.

[66] The Plaintiff further submits that Clause 19.5 of the Contract does not oblige it to name the Moving Parties as additional insureds. However, Clause 19.1 obliges Miller Shipping to take out insurance sufficient to cover its own liability and also to name the Plaintiff as additional assureds. It argues that since Miller Shipping's liability for lost cargo was covered by this insurance, there is no reason why the cargo insurance taken out by it should be deemed to cover the same liability.

[67] Finally, the Plaintiff submits that if the parties intended Clause 19.5 to benefit the Moving Parties, they would have made that clear, as was done in Clause 19.1. It argues that Clause 19.5 operates to its benefit only. It submits that the Clause means that the Plaintiff will pay the premiums on the cargo insurance and Miller Shipping will not pass the cost of those premiums on to the Plaintiff. It submits that Clause 19.5 does not show an intention of AGF to waive its rights of action or subrogation.

[68] In response to the argument of the Miller Defendants that the Contract excludes the liability of Midnight Marine for the loss of the cargo, the Plaintiff argues that both Midnight Marine and Miller Shipping are "carriers" under the Contract. It accepts that Midnight Marine is a party to the Contract but submits that should the Court determine that Midnight Marine is not a

carrier, then it is not a "party" to the Contract. It says that Midnight Marine is an "affiliate" under the Contract and affiliates are not mentioned in Clauses 6.13, 18.2 or 19.5.

[69] The Plaintiff also submits that Clause 6.13 is not "conclusive" to exclude the liability of Midnight Marine because that Clause only states that Miller Shipping accepts responsibility for its agents and contractors, and nothing in the Contract prohibits actions against contractors.

[70] The Plaintiff further argues that any ambiguity in the Contract ought to be interpreted against the drafter, relying on the decision in *Consoldiated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance*, [1980] 1 S.C.R. 888.

[71] The Plaintiff submits that Midnight Marine, if an affiliate, cannot enjoy implied benefits of the Contract. "Affiliate" is a defined term of the Contract and implied benefits would negate the express wording of the Contract. The Plaintiff says it never intended to extend benefits to Midnight Marine because it dealt with Miller Shipping, exclusively, as the carrier of the cargo, as was the case in *London Drugs*, *supra*.

[72] As for the liability of the *in rem* Defendants for the loss of the cargo, the Plaintiff submits that Midnight Marine is liable as ship owner and as carrier, whether under the Contract or in tort. It argues that the liability of the *in rem* Defendants is a moot issue since Clause 9.0 of the Contract provides a lien on the vessels.

C. *The Submissions of MSI*

[73] MSI did not address the appropriateness of a motion for summary judgment by the Miller Defendants. In oral submissions, it supported the Moving Parties' arguments about the characterization of the Contract as a charterparty, which is not subject to the Hague-Visby Rules.

[74] MSI also made submissions about the interpretation of the Contract. It argues that in determining whether the Contract excludes liability, the Court must apply an objective test; contract interpretation is not dependent upon the subjective intentions of the parties.

[75] MSI also submits that a charterparty is a contract between commercial entities and parties should be held to their bargains, relying on the decision in *Federal EMS*, *supra*.

[76] It argues that the only interpretation to be given to "property", as referenced in Clause 18.2 of the Contract, is to the cargo and the Plaintiff had no other property other than the cargo.

[77] Further, MSI submits that if this action is dismissed in favour of the Miller Defendants, on the basis of the "knock for knock" agreement or the covenant to insure, the action should also be dismissed against it, since it is entitled to benefit from the immunities and limitations of liability of the Miller Defendants, pursuant to the specific terms of the Contract.

[78] MSI says that it is a contractor hired by Miller Shipping. Relying upon Clause 6.13 of the Contract, it argues that it is not liable to AGF because that clause provides that Miller Shipping is responsible for its contractors.

[79] Finally, MSI criticizes the failure of the Plaintiff to present the evidence necessary to support its arguments on unconscionability.

VII. DISCUSSION

[80] As noted above, the Miller Defendants bring this motion for summary judgment pursuant to Rules 213-215. Rules 214 and 215 are relevant and provide as follows:

214 A response to a motion for summary judgment shall not rely on what might be adduced as evidence at a later stage in the proceedings. It must set out specific facts and adduce the evidence showing that there is a genuine issue for trial.	214 La réponse à une requête en jugement sommaire ne peut être fondée sur un élément qui pourrait être produit ultérieurement en preuve dans l'instance. Elle doit énoncer les faits précis et produire les éléments de preuve démontrant l'existence d'une véritable question litigieuse.
215 (1) If on a motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.	215 (1) Si, par suite d'une requête en jugement sommaire, la Cour est convaincue qu'il n'existe pas de véritable question litigieuse quant à une déclaration ou à une défense, elle rend un jugement sommaire en conséquence.
(2) If the Court is satisfied that the only genuine issue is	(2) Si la Cour est convaincue que la seule véritable question litigieuse est :
(a) the amount to which the moving party is entitled, the Court may order a trial of that issue or grant summary judgment with a reference under rule 153 to determine the amount; or	a) la somme à laquelle le requérant a droit, elle peut ordonner l'instruction de cette question ou rendre un jugement sommaire assorti d'un renvoi pour détermination de la somme conformément à la règle 153;
b) a question of law, the Court	b) un point de droit, elle peut

may determine the question and grant summary judgment accordingly.	statuer sur celui-ci et rendre un jugement sommaire en conséquence.
(3) If the Court is satisfied that there is a genuine issue of fact or law for trial with respect to a claim or a defence, the Court may	(3) Si la Cour est convaincue qu'il existe une véritable question de fait ou de droit litigieuse à l'égard d'une déclaration ou d'une défense, elle peut :
(a) nevertheless determine that issue by way of summary trial and make any order necessary for the conduct of the summary trial; or	a) néanmoins trancher cette question par voie de procès sommaire et rendre toute ordonnance nécessaire pour le déroulement de ce procès;
(b) dismiss the motion in whole or in part and order that the action, or the issues in the action not disposed of by summary judgment, proceed to trial or that the action be conducted as a specially managed proceeding.	b) rejeter la requête en tout ou en partie et ordonner que l'action ou toute question litigieuse non tranchée par jugement sommaire soit instruite ou que l'action se poursuive à titre d'instance à gestion spéciale.

[81] The test upon a motion for summary judgment is that the moving party must show, upon the evidence and the arguments, that there is no genuine issue for trial.

[82] The burden of showing that there is no genuine issue for trial is high; see the decision in *Canada (Attorney General) v. Lameman*, [2008] 1 S.C.R. 372 at paragraph 11.

[83] Summary judgment should be granted only in the clearest of cases. In *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, the Supreme Court of Canada commented upon the issuance of summary judgment, relative to the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and said the following at paragraph 49:

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[84] More recently, the Federal Court of Appeal commented upon the application of *Hryniak*, *supra* to a motion for summary judgment pursuant to the Rules. At paragraph 11 of *Manitoba v. Canada*, 2015 FCA 57, Justice Stratas said the following:

> In my view, *Hryniak* does bear upon the summary judgment issues before us, but only in the sense of reminding us of certain principles resident in our Rules. It does not materially change the procedures or standards to be applied in summary judgment motions brought in the Federal Court under Rule 215(1).

[85] The parties to a motion for summary judgment must put their best foot forward and cannot rely upon evidence which may be adduced later at trial to establish a genuine issue for trial; see the decision in *Harrison et al. v. Sterling Lumber Co.* (2010), 399 N.R. 21 (F.C.A.).

[86] The goal of this motion is to obtain a judgment in favour of the Miller Defendants on the basis that the Contract is a charterparty and consequently, not subject to the Hague-Visby Rules.

[87] Article III of the Hague-Visby Rules sets out the responsibilities and liabilities of carriers and shippers; see the decision in *Timberwest Forest Corp. v. Pacific Link Ocean Services Corp.* (2009), 388 N.R. 189 (F.C.A.). Clause 8 of Article III of the Hague-Visby Rules limits the ability of parties to contract out of those obligations and provides as follows:

8 Any clause, covenant or	8 Toute clause, convention ou

agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect. A benefit of insurance or similar clause shall be deemed to be a clause relieving the carrier from liability.	accord dans un contrat de transport exonérant le transporteur ou le navire de responsabilité pour perte ou dommage concernant des marchandises provenant de négligence, faute ou manquement aux devoirs ou obligations édictés dans le présent article ou atténuant cette responsabilité autrement que ne le prescrivent les présentes règles sera nul, non avenu et sans effet. Une clause cédant le bénéfice de l'assurance au transporteur ou toute clause semblable sera considérée comme exonérant le transporteur de sa responsabilité.

[88] The effect of finding that the Contract is a charterparty and not subject to the Hague-Visby Rules is that the prohibition against clauses excluding or limiting liability to an amount less than that provided in those Rules does not apply.

[89] The non-application of the Hague-Visby Rules means the parties were at liberty to negotiate their own terms and conditions. As discussed in *Tercon, supra* at paragraphs 82, 85 and 115-117, there is a public interest in the freedom of contract between sophisticated parties in a commercial environment and courts should rarely decline to enforce terms of a contract.

[90] The first issue to be addressed is whether the Contract is subject to the Hague-Visby Rules. The Moving Parties say that it is not and the Plaintiff says that it is.

[91] It is clear, from the evidence submitted, that no bill of lading was issued relative to the transportation of the cargo and that the Contract itself does not refer to the Hague-Visby Rules. The characterization of the Contract, as a charterparty or a contract for the carriage of goods by water, depends upon the reasonable inferences to be drawn from the relevant evidence and applicable jurisprudence.

[92] As outlined above, the evidence presented on this motion consists of the affidavit of Mr. Patrick Miller, the affidavit of Mr. Colangelo, as well as the transcript of the cross-examination of Mr. Miller upon his affidavit, and the transcript of the cross-examination, by MSI, of Mr. Colangelo.

[93] The Plaintiff also filed, as part of its responding motion record, the transcript of a discovery examination conducted of Mr. Miller on March 4, 2011.

[94] No submissions were made during the hearing of this motion as to the propriety of the inclusion of the discovery examination of Mr. Miller as part of the Plaintiff's record, nor about the purpose for which the discovery examination was tendered.

[95] I am not persuaded that this discovery transcript is properly before the Court on this motion for summary judgment, in light of Rules 288 to 291, which govern the use of discovery evidence at trial. These Rules provide that discovery examination may be used at trial in limited circumstances, including as evidence adopted by the examining party as its evidence, to impeach

the credibility of the witness being examined or to provide evidence when the witness is otherwise unavailable by reason of illness or death.

[96] None of these limited circumstances apply in this motion. Accordingly, I decline to consider this evidence in disposing of the within motion, although I have read that transcript.

[97] I turn now to the nature of the Contract. This Contract was negotiated between Miller Shipping and the Plaintiff, following the presentation of proposals which were discussed between the Plaintiff, as represented by Mr. Colangelo and Miller Shipping, as represented by Mr. Miller.

[98] Literally, the Contract was for the transportation of cargo, that is the steel rebar, by water, that is from Sorel, Québec to Long Pond, Newfoundland and Labrador. The Plaintiff argues that the Contract was a "simple" contract for the carriage of goods by water, relying on the fact that the transportation was effected on water.

[99] Contrariwise, the Moving Parties submit that, as a matter of fact and law, the Contract was a charterparty.

[100] The face page of the Contract, attached as Exhibit B to the affidavit of Mr. Miller, sworn on April 2, 2015, describes the document as a "Cargo Contract between Miller Shipping Limited and AGF Steel Inc." The next line says "As per Proposal dated September 10th, 2012".

[101] Page 2 of the Contract, following a "Table of Contents", is entitled "Time Charter Party". In Box 2, it describes Miller Shipping Limited as the "Contractor". In Box 3, AGF is recorded as the "Charterer".

[102] The Contract provides for the transportation of a quantity of steel rebar from Sorel, Québec to Long Pond, Newfoundland and Labrador. The Contract contemplates six voyages with estimated weights as set out in Box 14.

[103] The Contract provides for the loading and unloading of the cargo; see Clause 24.

[104] As outlined above, the Moving Parties submit that the language of the Contract suggests that it is a charterparty, not a contract for the carriage of goods by water. The preamble to the Contract provides as follows:

> This Time Charter Party (hereinafter called the "Charter") made
>
> BETWEEN: Miller Shipping Limited, having an office in the city of St. John's, in the Province of Newfoundland & Labrador, Canada (hereinafter called "Contractor");
>
> AND: AGF Inc., with its head office in Longueuil in the Province of Quebec, (hereinafter called "Charterer").
>
> WHEREAS Charterer and Contractor hereby mutually agree to the Charter of the vessel(s) M/V Western Tugger and Barge Arctic Lift (hereinafter called the "Vessel") in accordance with this Charter Party, including any Exhits [sic], Annexes and Appendices thereto.

[105] Clause 3 of the Contract is entitled "Employment of Vessel". Clause 4 is entitled "Period of Hire/Extension of cargo volume". Clause 18 is entitled "Liability and Indemnification".

[106] Clauses 18.1 and 18.2 specifically address assumption of liability as follow:

> 18.1 For the purposes of this contract, any liability assumed or indemnity given by Contractor for the benefit of Charterer, the Charterer, their successors and assigns, and their respective Affiliates, officers, employees, contractors, agents, servants and invitees of the foregoing.
>
> 18.2 Contractor and Charterer agree that each party shall, with respect to:
>
> (i) its own officers, employees, servants, invitees, agents and contractors,
>
> (ii) the property of its own officers, employees, servants, invitees, agents and contractors.
>
> (iii) its own property (which for the avoidance of doubt includes any owned or leased marine vessel, the Vessel, or equipment used by or on behalf of Contractor in performance of the Services and excluded any cargo stowed and secured by Contractor) or property of any person or company who is a party to a contract with it;
>
> > (a) Be liable for all losses, costs, damages, expenses and legal expenses whatsoever which it may suffer, sustain, pay or incur, directly or indirectly arising from or in connection with this contract on account of bodily injury to or death of such persons or damage to such persons or loss of or damage to such property; and in addition; and
> >
> > (b) Defend, indemnify and hold harmless the other party against all actions, proceedings, claims, demands, losses, costs, damages, expenses and legal expenses whatsoever which may be brought against or suffered by the other party to this Charter or which the other party to this Charter may sustain, pay, or incur, directly or indirectly arising from or in connection with the Charter on account of bodily injury to or death of such persons or damage to such persons or loss of or damage to such property.
>
> This liability and indemnity shall apply without limit and without regard to cause or causes, including without limitations, the negligence, whether sole, concurrent, gross, active, passive, primary or secondary, or the willful act or omission, of either party to this Charter or any other person otherwise.

[107] According to the decision in *Federal EMS, supra* at paragraphs 59 and 78-79, a contract for the transportation of goods by water is properly characterized as a charterparty in the following circumstances:

> Charter-parties are normally described as contracts of hire of a ship. In French they are referred to as "contrats d'affrètement" (see William Tetley, *Marine Cargo Claims*, 4th edition (Cowansville, Quebec: Yvon Blais, 2008), at page 530, note 24). There are three main types of charter-parties:
>
> (i) the bareboat or demise charter, which provides for the hire of an unmanned ship;
>
> (ii) the time charter-parties, which are contracts for the hire of a fully manned ship for a specific duration. These include the more recent type of time charter, referred to as a slot-charter, where for example a carrier will hire from a competitor specific space or a slot (containership) for a specific time period;
>
> (iii) the voyage charter-parties, which are used to hire a specific ship or type of ships for one or more voyages.
>
> …
>
> That said, in the context of legislation dealing with the rights and obligations of common carriers and which implements international rules, I am satisfied that this expression [contract for the carriage of goods by water] would not and should not be understood to include charter-parties.
>
> This legal conclusion is consistent with commercial reality. Charter-parties are contracts between commercial entities dealing directly with each other, whose execution and enforcement are the private concern of the contracting parties. There is no policy reason why such actors should not be held to their bargains.

[108] The Plaintiff presents a torturous argument, referring to paragraph 13 of the Further Amended Statement of Defence, to submit that the Miller Defendants have admitted that Miller Shipping is a carrier. In oral submissions, the Plaintiff argued that:

> Again, to come back to the broad statement made by the Court of Appeal, yes, in normal circumstances the charterparty is not a contract of carriage, but that's in the understanding that the charterer is not the carrier. When the charterer becomes the carrier, then it's a contract of carriage.

[109] It submits since Miller Shipping is the carrier, the Contract must be a "contract for the carriage of goods by water" as referred to in subsection 43(2) of the Act.

[110] In my opinion, this argument cannot succeed. The Contract describes Miller Shipping as the "Contractor" and the Plaintiff as the "Charterer." The Contract contemplates the hire of the tug and barge to transport the cargo.

[111] In pith and substance, and considering the recent relevant jurisprudence of the Federal Court of Appeal, I am satisfied that the Contract between the Plaintiff and the Miller Shipping is a charterparty, and I so find.

[112] In light of the decision in the *Federal EMS*, *supra*, and subsection 43(2) of the Act, the status of the Contract as a charterparty means that the Hague-Visby Rules do not apply, regardless of the silence in the Contract about those Rules.

[113] In these circumstances, the parties were at liberty to negotiate the terms about their respective liability under the Contract. According to the Miller Defendants, they did so, pursuant to Clause 18.2, whereby the parties agreed to assume responsibility for their respective property.

[114] The Miller Defendants argue that the contracting parties agreed to cover their respective risks by obtaining insurance as addressed by Clause 19.

[115] The arguments advanced relative to Clauses 18.2 and 19.5 involve questions of interpretation. The Moving Parties argue that the correct interpretation of Clauses 19.1 and 19.5 means that Miller Shipping and the Plaintiff, through the insurance coverage purchased on their respective behalves, are indemnified against loss or damage without one taking action against the other.

[116] The Miller Defendants, in respect of Clauses 18.2 and 19.5, further submit that the correct interpretation of these clauses means that indemnification against actions for loss or damage extends to Midnight Marine and the Defendant ships.

[117] MSI, a subcontractor engaged by Miller Shipping, supports the submissions of the Miller Defendants. It argues that, upon the correct interpretation of Clauses 18.2 and 19.5 of the Contract, it is entitled to the benefit of those clauses and is protected against suit.

[118] Unsurprisingly, the Plaintiff urges a different interpretation of these clauses.

[119] It argues that it never intended to abandon its right of action. It challenges the interpretation of the clauses proposed by the Moving Parties, as supported by MSI. It urges that the Contract is unconscionable, in so far as Miller Shipping purported to provide a craft that was

capable of transporting 7,700 metric tonnes of cargo and that its failure to do so gives rise to a basis for setting aside the Contract.

[120] The Plaintiff submits that further evidence is required to support its challenges to the Contract, including further evidence about the intentions of the contracting parties.

[121] The issue of contractual interpretation is one of mixed fact and law; see the decision in *Pêcheries Guy Laflamme Inc. v. Capitaines propriétaires de la Gaspésie (A.C.P.G) Inc.*, 2015 FCA 78 at paragraph 5.

[122] In *Sattva Capital Corp.*, *supra* at paragraph 53, the Supreme Court of Canada said it may be possible to identify an inextricable question of law from what was initially characterized as a question of mixed fact and law:

> Nonetheless, it may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law (*Housen*, at paras. 31 and 34-35). Legal errors made in the course of contractual interpretation include "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor" (*King*, at para. 21). Moreover, there is no question that many other issues in contract law do engage substantive rules of law: the requirements for the formation of the contract, the capacity of the parties, the requirement that certain contracts be evidenced in writing, and so on.

[123] However, the Court cautioned that contractual interpretation is inherently fact specific and the circumstances where a question of law can be extricated from the interpretation process will be rare; see *Sattva*, *supra* at paragraph 54.

[124] The principal object of contractual interpretation is to give effect to the intentions of the party, at the time the contract was made; see the decision in *Bhasin v. Hrynew*, [2014] 3 S.C.R. 494 at paragraph 45.

[125] In my opinion, the issues of contractual interpretation here are questions of mixed fact and law, and the questions of law cannot be clearly isolated. If the questions of law could be identified with confidence, those questions could be decided on this motion.

[126] Questions relating to the interpretation and application of the exclusionary clause in Clause 18.2, the covenant to insure in Clause 19.5, the extension of these benefits to Midnight Marine and MSI, and the liability of the Defendant ships are genuine issues for trial. There is insufficient evidence on this motion, from any party, to confidently determine their respective rights and liabilities of the parties.

VIII. CONCLUSION

[127] As noted above, I am satisfied that the Contract in issue in this action is a charterparty which is not subject to the Hague-Visby Rules. The principal evidence required to assess the nature of the Contract, as a charterparty or otherwise, is the Contract itself. It is an independent document and the arguments about its status raise a discrete issue that is capable of determination upon the evidence and arguments advanced in this motion for summary judgment.

[128] My finding that the Contract is a charterparty leads to certain consequences in law. According to the decisions in *Federal EMS*, *supra* and *Wells Fargo*, *supra*, the effect of my

finding is that the Hague-Visby Rules do not apply. This means that the bar against contractual terms relieving a party from liability for loss or damage does not apply. The parties were at liberty to include such terms in the Contract.

[129] However, the interpretation and application of those terms, specifically Clauses 18.2 and 19.5, as addressed by the parties, do not so readily yield to a final determination, upon the evidence submitted.

[130] The guiding authorities on summary judgment, including the decisions of *Hryniak*, *supra*, *Manitoba*, *supra*, and *Lac Seul First Nation v. Canada*, 2014 FC 296, direct that a court, in adjudicating a motion for summary judgment, have confidence that the evidence tendered allows identification of the necessary and relevant facts, and application of the pertinent legal principles to fairly resolve the dispute.

[131] I do not have the necessary confidence in the evidence adduced, in this motion, to determine the issues of contractual interpretation.

[132] The evidence, including the cross-examination of Mr. Miller, raises a dispute on the facts, in particular the capacity of the barge to carry the Plaintiff's cargo. The affidavit of Mr. Colangelo, filed on behalf of AGF, raises other contentious factual issues, including the parties' understanding of the scope of the Contract and the objective intentions of the parties.

[133] The Moving Parties robustly resist the allegations of unconscionability, on the basis that the Plaintiff cannot establish "unconscionability", as discussed by the Supreme Court of Canada in *Tercon*, *supra*. In my opinion, this issue also meets the criterion of a genuine issue for trial.

[134] In the result, the motion for summary judgment was granted in part by the Judgment that was issued on April 20, 2016. The Contract is a charterparty and the Hague-Visby Rules do not apply. The remaining issues will proceed to trial.

[135] The Moving Parties are entitled to costs in respect of their success; brief submissions on costs may be filed within two weeks of the Judgment if the parties cannot otherwise agree on costs.

"E. Heneghan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-940-13
STYLE OF CAUSE:	AGF STEEL INC. v MILLER SHIPPING LIMITED, MIDNIGHT MARINE LIMITED, THE TUG "WESTERN TUGGER", THE OWNERS AND ALL OTHERS INTERESTED IN THE TUG "WESTERN TUGGER", THE BARGE "ARCTIC LIFT 1", THE OWNERS AND ALL OTHERS INTERESTED IN THE BARGE "ARCTIC LIFT 1", THE TUG "NORTHERN TUGGER", THE OWNERS AND ALL OTHERS INTERESTED IN THE TUG "NORTHERN TUGGER", THE BARGE "LABLIFT", THE OWNERS AND ALL OTHERS INTERESTED IN THE BARGE "LABLIFT", AND MARINE SERVICES INTERNATIONAL (2008) LTD. AND MILLER SHIPPING LIMITED
AND	MILLER SHIPPING LIMITED AND MIDNIGHT MARINE LIMITED V AGF STEEL INC. AND MARINE SERVICES INTERNATIONAL (2008) LTD.
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	OCTOBER 19, 20, 2015
REASONS FOR JUDGMENT:	HENEGHAN J.
DATED:	APRIL 22, 2016

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