Federal Court  Cour fédérale

Date: 20190327

Docket: T-436-17

Citation: 2019 FC 379

Toronto, Ontario, March 27, 2019

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

BLACK & WHITE MERCHANDISING CO. LTD

Plaintiff

and

DELTRANS INTERNATIONAL SHIPPING CORPORATION

Defendant

JUDGMENT AND REASONS

[1] This is a motion brought by the Defendant, Deltrans International Shipping Corporation [Deltrans], pursuant to Rule 221 of the *Federal Courts Rules*, SOR/98-106 [Rules], seeking to strike out the Statement of Claim filed by Black & White Merchandising Co. Ltd. [B&W], the Plaintiff in this action, on the grounds that there is no reasonable cause of action. Alternatively, and pursuant to Rule 215, Deltrans seeks summary judgment dismissing B&W's claim on the basis that there is no genuine issue for trial.

Background

[2] B&W is in the business of wholesaling children's shoes. It is undisputed that B&W purchased 8580 pairs of children's rain boots [Cargo] from Fuzhou Harvest Trading Enterprises Co. Ltd. [Fuzhou] to be shipped from China to B&W in Montreal.

[3] Deltrans' motion is supported by the affidavit of Mr. Robert Di Salvo, Director of International Freight Operations, Delmar International Inc. [Delmar], sworn on February 4, 2019 [Di Salvo Affidavit]. The Di Salvo Affidavit provides no information as to Deltrans' business operations but states that Delmar provides general freight forwarding, customs brokerage, and commercial cargo transportation and logistics services. Mr. DiSalvo states that he manages international operations, including sea and air freight for all of Canada and that he is personally aware of the facts set out in his affidavit.

[4] According to the Di Salvo Affidavit, on December 12, 2016, B&W submitted a booking request to Delmar to arrange for the transportation of the Cargo from Ningbo, China to Montreal, Québec. Delmar, on behalf of B&W and in accordance with its mandate, contacted Deltrans to arrange a portion of the transportation of the Cargo. Delmar also contacted IPE Logistics Inc. [IPE] to provide logistics services for the transportation of the Cargo. IPE was responsible for retaining Canchi Bon Trading Company Inc. [Canchi] to arrange for warehousing of the Cargo.

[5] It is undisputed that on January 12, 2017, Delmar issued to B&W a Pre-Advice Notice of Shipment informing of the upcoming arrival of its shipment. A copy of this document is

attached as an exhibit to the Di Salvo Affidavit as well as to the affidavit of Mr. Barry Schwartz, President and CEO of B&W, sworn on February 25, 2019 [Schwartz Affidavit] filed in support of B&W's responding motion record opposing Deltrans' motion. According to the Di Salvo Affidavit, in accordance with its operating procedure, Delmar's operating system generated the Pre-Advice Notice. This document states that Delmar is advising of the upcoming arrival of the shipment and that it should be noted that the dates indicated are representative of the equipment arrival date and to "…allow 48-72 hours for Destuffing and delivery (if applicable)." It lists other information including the loading port, being Ningbo, China; the vessel, being the COSCO FELIXSTOWE; the mode of transport, being by sea; the carrier, being China Ocean Shipping Co (COSCO); the departure date, being January 12, 2017; the port of discharge, being Prince Rupert, British Columbia with an estimated time of arrival [ETA] of January 21, 2017; and, the port of destination, being Montreal, Québec with an ETA of January 31, 2017.

[6] It is also undisputed that Deltrans issued Bill of Lading No. DMN31603961, stated on its face to be for combined transport shipment or port to port shipment, dated January 12, 2017 [BOL], which was provided to B&W on same date. The BOL is a Deltrans document and is an exhibit to both the Di Salvo and Schwartz Affidavits. It identifies the Shipper as Fuzhou; the Consignee as "to the Order of" B&W; the Notify Party as B&W; "For Delivery Please Apply To" Delmar; the place of receipt and port of loading to be Ningbo, China; the vessel as COSCO FELIXSTOW; the port of discharge as Prince Rupert, BC, Canada; the place of delivery as Montreal, Canada; and, the type of move as CY/CY.

[7] A Delmar Cargo Management System [DCMS] automated email notification entitled "DCMS Update – Container/Equipment Picked Up from Terminal, Transferring to Sufferance Warehouse – ID: 11762106 – FUZHOU HARVEST LAND INDUSTRY CO.LTD – 715.0 Carton - TCNU3297794" was sent to B&W, on February 5, 2017. This notification is an exhibit to both the Di Salvo and Schwartz Affidavits. Under logistics information it states:

> Event: Container/Equipment Picked up From Terminal, Transferring to Sufferance Warehouse
>
> Date &Time: 2017-02-05 14:56
>
> Remarks: Cntr TCNU 3297794 Pcs CTN Current Location of Goods: CN Montreal TASCH YD, PQ

[8] The Di Salvo Affidavit states that on February 6, 2017, IPE sent an email to Delmar advising that Cntr TCNU 3297794, and its chassis, had been stolen from the Canchi warehouse early that morning. IPE stated that Delmar had 715 cartons in the container and asked that Delmar send the commercial invoices to cover the cartons, which would be forwarded to Canchi for insurance purposes. By email of same date, Delmar advised B&W that the container had been stolen and that B&W should notify its insurance company. By letter of February 20, 2017, which is an exhibit to the Di Salvo Affidavit, B&W advised Delmar that, in light of the theft, it put Delmar on notice not to send any of B&W's shipments to the Canchi warehouse for any third party logistics services provided for B&W.

[9] On March 22, 2017, B&W issued its Statement of Claim, *in personam*, as against Deltrans alleging that the Cargo was lost and never delivered as a result of Deltrans' breach of the contract of carriage and negligence. Further, as Deltrans contracted with third parties, such as the inland warehouse, which acted recklessly and with knowledge that the damage or loss

would probably occur, that Deltrans is not entitled to invoke any rights or immunities or limitations of liability to which it might otherwise be entitled under the contract of carriage or by law. B&W claims damages of $63,950 plus interest and costs. Deltrans duly filed a Statement of Defence. This, amongst other things, asserts that Deltrans at all times acted as the contracting carrier, that it never had the Cargo in its possession and, that it did not retain Canchi.

[10] Deltrans filed the subject motion on February 6, 2019.

[11] There is one significant disputed fact in this motion and that is when and where the Deltrans contract of carriage ended. The Di Salvo Affidavit states that Deltrans was retained pursuant to the terms and conditions contained in the BOL, which included that the type of move is voyage "CY/CY". It is uncontested that this means "container yard to container yard". The Di Salvo Affidavit states that, in the context of the BOL, the container yards referred to are the Ningbo Zhoushan Port Co. Ltd Beilun Second Container Terminal Branch at the Ningbo Port in China [Ningbo Yard] and CN's Taschereau yard located at Canadian National Montreal Taschereau Yard Rd, Ville Saint-Laurent, Québec [CN Yard]. Deltrans' view is that, when the Cargo was delivered in good order to the CN Yard, Deltrans had met all of its obligations under the BOL, which was then exhausted.

[12] Conversely, the Schwartz Affidavit states that on or about January 12, 2017, B&W contracted with Deltrans for the shipment of the Cargo from Ningbo, China to B&W's warehouse located at 170 Boulevard Marcel-Laurin, Ville Saint-Laurent, Québec [B&W Warehouse]. B&W's view is that it was the intent of B&W and Delmar that the BOL would

require the Cargo to be delivered to the B&W Warehouse, as was the custom. As the Cargo was stolen from Canchi, who B&W claim are a subcontractor of Deltrans, Deltrans is liable for the loss.

[13] In my view, the question of when and where the BOL was completed is determinative of this motion.

Issues

[14] Although Deltrans frames the issues somewhat differently, in my view, they are captured by, and this motion raises, the following two issues:

i. Should B&W's claim be struck out for want of jurisdiction? If not,

ii. Should summary judgement be granted to Deltrans?

Relevant Legislation

i) Federal Courts Rules:

> **Striking Out Pleadings**
>
> **221 (1) Motion to Strike -** On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it
>
> (a) discloses no reasonable cause of action or defence, as the case may be,
>
> […]
>
> and may order the action be dismissed or judgment entered accordingly.

(2) Evidence - No evidence shall be heard on a motion for an order under paragraph (1)(a).

Summary Judgement

214. Facts and evidence required - 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.

215 (1) If no genuine issue for Trial - 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.

(2) Genuine issue of amount or question of law - If the Court is satisfied that the only genuine issue is

> **(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
>
> **(b)** a question of law, the Court may determine the question and grant summary judgment accordingly.

(3) Powers of the Court - 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

> **(a)** nevertheless determine that issue by way of summary trial and make any order necessary for the conduct of the summary trial; or
>
> **(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.

ii) ***Federal Courts Act, RSC 1985, c F-7:***

22 (1) Navigation and Shipping - The Federal Court has concurrent original jurisdiction, between subject and subject as well as otherwise, in all cases in which a claim for relief is made or a remedy is sought under or by virtue of Canadian maritime law or any other law of Canada relating to any matter coming within the

> class of subject of navigation and shipping, except to the extent that jurisdiction has been otherwise specially assigned.
>
> **(2) Maritime Jurisdiction -** Without limiting the generality of subsection (1), for greater certainty, the Federal Court has jurisdiction with respect to all of the following:
>
> > **(f)** any claim arising out of an agreement relating to the carriage of goods on a ship under a through bill of lading, or in respect of which a through bill of lading is intended to be issued, for loss or damage to goods occurring at any time or place during transit;

Positions of the Parties

Deltrans' Submissions

[15] Deltrans submits that B&W's Statement of Claim should be struck out pursuant to Rule 221(1)(a) because it is plain and obvious that the Federal Court lacks jurisdiction to hear B&W's claim.

[16] Referencing the three-part test for jurisdiction set out by the Supreme Court of Canada in *ITO-Int'l Terminal Operators v Miida Electronics*, [1986] 1 SCR 752 [*ITO*], Deltrans submits that s 22 of the *Federal Courts Act*, being the Federal Court's principal statutory grant of jurisdiction in maritime law, as required in the first branch of the *ITO* test, does not grant jurisdiction over losses that occur during warehousing, after the transportation of cargo is concluded. Here, the BOL covered the transportation of the Cargo from the Ningbo Yard to the CN Yard. The theft occurred after the carriage under the BOL was complete and it did not arise out of the BOL. Rather, the loss occurred while the Cargo was in the custody of Canchi, a warehouser (*Matsuura Machiner Corporation v Melburn Truck Lines Ltd*, 1997 CanLII 4905

(FCA) [*Matsuura*]; *Certain Underwriters at Lloyd's and Soline Trading Ltd v Mediterranean Shipping Company S.A.*, 2017 FC 460 [*Mediterranean Shipping*]; *Elroumi v Shenzhen Top China Imp & Exp Co. Ltd, China*, 2018 FC 663 [*Elroumi*]).

[17] Alternatively, and as to summary judgment, Deltrans submits that there are two grounds that support its view that there is no genuine issue for trial. First, it discharged all of its obligations under the BOL when it delivered the Cargo in good order to CN's Yard. Second, clause 5.1 of the BOL relieves Deltrans of all liability for a loss that occurred due to an event that it could not avoid or prevent through the exercise of due diligence. Deltrans did not arrange for the warehousing of the Cargo as it was not within its mandate to do so. It did not retain Canchi's services. It was not a party to any warehousing contract with Canchi, and it was not involved in the unloading and storing of the Cargo at the Canchi warehouse. Accordingly, it cannot be argued that Deltrans was negligent in the decision to store the Cargo or to retain Canchi's services. And, as Deltrans could not avoid or prevent Canchi's negligence by the exercise of due diligence, it may rely on clause 5.1 of the BOL (*Boutique Jacob Inc. v Pantainer Ltd.*, 2006 FC 217 rev'd on other grounds in 2008 FCA 85).

[18] Deltrans submits that summary judgement is the appropriate remedy given that Deltrans' obligations and liability under the BOL can be established on the basis of the parties' evidentiary record. There is no genuine issue for trial in this case as, based on the evidence presented, there is no legal basis for B&W's claim (*Hryniak v Mauldin*, [2014] 1 SCR 87 at para 48 [*Hryniak*]; *Granville Shipping Co. v Pegasus Lines Ltd SA*, [1996] 2 FC 853 (FC) pgs 4–5 [*Granville*] *Manitoba v Canada*, 2015 FCA 57 at para 11 [*Manitoba*]; *Canusa Systems Ltd. v Canmar*

Ambassador (the) (1998), 146 FTR 314 (FC); *Kodak v Racine Terminal (Montreal) Ltd*. (1990), 165 FTR 299; *Riva Stahl Gmbh v Bergen Sea (The)* (1999), 243 NR 183 (FCA); *Locher Evers International v Canada Garlic Distribution Inc*., 2008 FC 319; *Hapag-Lloyd Container Linie GmbH v Moo Transport & Commodities Inc.*, 2009 FC 201).

B&W's Position

[19] B&W disputes that the theft occurred outside the scope of the BOL. It submits that the BOL does not accurately represent the agreement between the parties concerning the transport of the Cargo. Rather, B&W contracted with Deltrans "and/or Delmar" for the carriage of its Cargo up until the B&W Warehouse and that there is a well-established past business practice, custom and understanding in this regard. Indeed, if Deltrans' argument were accepted, it would mean that there is an entire leg of the transport of the Cargo which is unaccounted for and not evidenced by a contract of carriage – the portion from the CN Yard to the B&W Warehouse.

[20] Further, Deltrans' contention that its obligations ended upon the arrival of the Cargo at the CN Yard rests, in part, on the premise of a false distinction between Deltrans and Delmar. In reality, Deltrans and Delmar are one and the same, or are conflated, as is confirmed by their actions. B&W submits that it is open to the Court to consider the combination of the longstanding custom and usage between it, Deltrans and Delmar, and the behaviour and actions of Deltrans to find that the BOL terminated at the B&W Warehouse (William Tetley, *Marine Cargo Claims* 4th ed (Québec, 2008: Les Éditions Yvon Blais Inc.) at Chapter 4, "Interpretation of Bills of Lading and Superseding Clauses", pgs 177–178,186, 192) [*Tetley*]).

[21] As to the jurisdiction of the Court, because Deltrans was responsible for the carriage of the Cargo up until the B&W Warehouse, this Court has jurisdiction over the claim. The loss occurred while the Cargo was in the care, custody, and control of Deltrans pursuant to a combined through BOL from Ningbo, China to the B&W Warehouse. The loss occurred while the Cargo was in the warehouse of Deltrans' subcontractor, Canchi. Prior to the theft, B&W had no knowledge that Canchi's services were being utilized. Further, Deltrans cannot plead that its BOL does not apply and also plead its terms and conditions in defense of their claim: either the BOL applies, or it does not. And, if clause 5.1(P) applies, it does not relieve Deltrans from liability as Canchi is its subcontractor. B&W notes that clause 6.4 of the BOL precludes Deltrans from taking any action against Canchi directly.

[22] Given that the Cargo was lost while in transit pursuant to a through bill of lading, the Federal Court has jurisdiction pursuant to s 22(2)(f) of the *Federal Courts Act* (*Matsuura*). Additionally, clause 29 of the BOL, the law and jurisdiction clause, states that disputes arising under the BOL shall be referred to the exclusive jurisdiction of the Federal Court of Canada. Thus, B&W was required to institute proceedings before this Court.

[23] B&W submits that Deltrans has not met its burden of proving that B&W's action presents no genuine issue for trial, as it has not established that the case is so doubtful that it does not deserve consideration at a future trial (*The Source Enterprises Ltd. v Canada (Public Safety and Emergency Preparedness and Minister of National Revenue*), 2012 FC 966 [*The Source*]).

Preliminary Matter

[24] Upon receipt of B&W's responding motion record, Deltrans sought to file a reply affidavit of Mr. Philip Louis, an attorney at Faguy & Co, counsel for Deltrans [Louis Affidavit]. This affidavit states that Mr. Louis conducted a search of Quebec's Enterprise Registry and that Delmar is a corporation incorporated under the *Companies Act*, CQLR c C-38, company number 1140128670, and that Deltrans is not a company registered in Quebec, attaching as exhibits the search results obtained in that regard. Mr. Louis states that Deltrans is a corporation incorporated under the *Companies Act of Barbados*, having company no. 27448, and attaches as an exhibit a Certificate of Incorporation showing same.

[25] When appearing before me, Deltrans submitted that the reply affidavit should be admitted because in B&W's written submissions responding to Deltrans' motion, B&W asserts, for the first time, that Deltrans and Delmar are "one and the same". Its pleadings do not contain this unsupported allegation. Although Delmar is of the view that ultimately this issue is immaterial, the admission of the Louis Affidavit serves to prevent the Court from being led into error as to the legal status of Delmar and Deltrans.

[26] For its part, B&W opposes the admission of the Louis Affidavit, although it may be relevant, on the basis that the Rules do not permit reply affidavits.

[27] I note that B&W's written representations assert that Deltrans' contention that its obligations under the BOL were completed by the arrival of the Cargo at the CN Yard rests in

part “on the premise of a false distinction between itself and Delmar” and that “[i]n reality, Defendant [Deltrans] and Delmar are one and the same” and that the two entities have acted in such a way that confirms B&W’s position that “the two entities are conflated”. B&W makes this assertion on the basis of the actions taken by Delmar. In that regard, the Schwartz Affidavit states: that on February 21, 2017, B&W’s solicitors sent a demand letter to Deltrans in care of Delmar; on February 23, 2017, Delmar responded to B&W’s demand letter without any allusion or mention of the fact that Deltrans and Delmar were two distinct entities; and, when B&W instituted proceedings at the Federal Court of Canada against Deltrans, the Statement of Claim was served on the Delmar place of business situated at 10636 Côte de Liesse in Lachine, Québec. In its written submissions, B&W adds that Deltrans’ Affidavit of Documents was sworn and signed by Mr. Di Salvo of Delmar and that he was also Deltrans appointed representative at the examination for discovery held in this action but did not represent that he held a position “within Defendant’s business Deltrans or allude to the fact that he was appointed by Deltrans specifically”. Further, all communications in relation to the contract of transport of the Cargo emanated from Delmar, which B&W asserts reinforces its position that Deltrans and Delmar are not separate entities.

[28] B&W is correct that the Rules do not expressly provide for reply affidavits to be filed on motions. However, in *Amgen Canada Inc v Apotex Inc*, 2016 FCA 121 [*Amgen*], the Federal Court of Appeal considered whether it had jurisdiction to allow the filing of reply evidence in the context of a motion in writing brought under Rule 369, which Rule also does not provide for the filing of evidence in reply. The Court of Appeal found that although the Rules were silent on the matter, the Court’s jurisdiction arises from Rules 55, 3, 4 and the Federal Court’s plenary

powers. Further, analogy could be made to Rule 312 and the jurisprudence developed thereunder as to the admission of additional affidavits in applications. The Federal Court of Appeal in *Amgen* held that the filing of reply evidence on a motion would be permitted only in unusual circumstances where considerations of procedural fairness and the need to make a proper determination require it.

[29] The admission by the Louis Affidavit raises similar considerations as those identified by the Court of Appeal in *Amgen*. The issue that this evidence addresses, the corporate legal status of Deltrans and Delmar, is new and has achieved an importance that Deltrans could not reasonably have anticipated when it filed its original motion record. Further, if the Court were to refuse to allow the evidence, the motion to strike might be decided on an erroneous basis, or put the parties to the expense of an unnecessary trial on the merits, either of which would work an injustice. And, in my view, given the nature of the evidence and its limited content, allowing the reply affidavit will not result in procedural unfairness or prejudice to B&W.

[30] Given B&W's assertion that Deltrans and Delmar are "one and the same" and the suggestion that this serves to support the Court's jurisdiction over B&W's claim against Deltrans, which is not contained in the Statement of Claim, and given that the pleading does not name Delmar as a defendant, I will admit the Louis Affidavit. While B&W's assertion is based on the actions of Delmar and Deltrans, the Louis Affidavit is significant as it establishes, based on public record documentation, that Delmar and Deltrans are in fact discrete legal entities.

Analysis

Issue 1: Should B&W's claim be struck out for want of jurisdiction?

[31] The test with respect to striking out pleadings under Rule 221 is whether it is plain and obvious that the claim discloses no reasonable cause of action. That is, assuming that the facts as stated in the statement of claim are taken as proven, is it plain and obvious that the plaintiff's statement of claim discloses no reasonable cause of action? If there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat" (*Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at p 973; *R v Imperial Tobacco*, 2011 SCC 42 (CanLII) at para 17).

[32] The plain and obvious test also applies when a lack of jurisdiction is the basis for the motion to strike (*Hodgson v Ermineskin Indian Band No 942* (2000), 180 FTR 285, aff'd [2000], 267 NR 143 (FCA) [*Hodgson FCA*], leave to appeal refused [2001] SCCA No 67 (QL) [*Hodgson FC*]; *Kona Concept Inc. v Guimond Boats Ltd*., 2005 FC 214 at paras 13; *Windsor City v Canadian Transit Co*, 2016 SCC 54 at para 24 [*Windsor City*]; *Apotex Inc v Ambrose*, 2017 FC 487 at paras 36–39 [Apotex Inc.]; *General MPP Carriers Ltd. SCL Bern AG*, 2014 FC 571 at para 33). The onus of proof on the party seeking to strike pleadings is a heavy one (*Apotex Inc. v Syntex Pharmaceuticals International Ltd.* (2005), 44 CPR (4th) 23 (FC) at para 31).

[33] However, a motion to strike under Rule 221(1)(a), brought on the ground that the Court lacks jurisdiction, has been found to differ from other motions to strike in that evidence may be adduced to support the claimed lack of jurisdiction, while in other cases an applicant must accept

everything that is pleaded as being true (*Hodgson* at para 10; *MIL Davie Inc. v Hibernia Management & Development Co.* (1998), 226 NR 369 (FCA) [*MIL Davie*]). When jurisdiction is disputed, the Court must be satisfied that there are jurisdictional facts or allegations of such facts supporting an attribution of jurisdiction. The existence of the necessary jurisdictional facts will normally be found in the pleadings and the affidavits filed in support of or in response to the motion to strike (*MIL Davie Inc.*; *Trawlercat Marine Inc. v Folden*, [2002] FCJ No 1601 at para 17 (Fed TD).

[34] As a preliminary point, I note that B&W references clause 29 of the BOL, the law and jurisdiction clause, which requires any claims arising under the BOL to be addressed in the Federal Court. However, parties cannot by agreement confer on the Court jurisdiction which it does not otherwise have (*Canada v Peigan*, 2016 FCA 133 at para 85). Accordingly, the existence of clause 29 does not serve to establish jurisdiction.

[35] Rather, and as noted above, the Supreme Court of Canada in *ITO* set out a three-part test to support a finding that the Federal Court has jurisdiction (*ITO* at page 766; *Windsor City* at para 34):

> 1. There must be a statutory grant of jurisdiction by the federal Parliament.
>
> 2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.
>
> 3. The law on which the case is based must be "a law of Canada" as the phrase is used in s. 101 of the Constitution Act, 1867.

[36] In this case, Deltrans challenges jurisdiction based on the first part of the three-part test. Specifically, that it is plain and obvious that the Federal Court lacks jurisdiction to hear B&W's claim because there is no statutory grant of jurisdiction.

[37] The first step in the jurisdictional analysis is to determine the essential nature or character of the claim (*Windsor City* at para 25; *Apotex Inc.* at para 47). As stated by the Supreme Court in *Windsor City*:

> [26] The essential nature of the claim must be determined on "a realistic appreciation of the practical result sought by the claimant" (*Domtar Inc. v. Canada (Attorney General)*, 2009 FCA 218, 392 N.R. 200, at para. 28, per Sharlow J.A.). The "statement of claim is not to be blindly read at its face meaning" (*Roitman v. Canada*, 2006 FCA 266, 353 N.R. 75, at para. 16, per Décary J.A.). Rather, the court must "look beyond the words used, the facts alleged and the remedy sought and ensure . . . that the statement of claim is not a disguised attempt to reach before the Federal Court a result otherwise unreachable in that Court" (*ibid.*; see also *Canadian Pacific Railway v. R.*, 2013 FC 161, [2014] 1 C.T.C. 223, at para. 36; *Verdicchio v. R.*, 2010 FC 117, [2010] 3 C.T.C. 80, at para. 24).
>
> [27] On the other hand, genuine strategic choices should not be maligned as artful pleading. The question is whether the court has jurisdiction over the particular claim the claimant has chosen to bring, not a similar claim the respondent says the claimant really ought, for one reason or another, to have brought.

[38] This Court has interpreted this to mean that the Court must identify the material facts needed to assess whether the claim falls within the statutory grant of jurisdiction identified in the first step of the *ITO* test (*Apotex Inc*. at para 48). Here the Statement of Claim is summary in nature. As described therein, the essential nature of B&W's claim is that Deltrans was the carrier of the Cargo and failed to perform its contractual obligations under the BOL, the contract of carriage, because it failed to deliver the Cargo. Further, Deltrans subcontracted with third parties,

such as the inland warehouse, which acted recklessly and with knowledge that the damage or loss would likely occur precluding Deltrans from invoking any of the rights, immunities or limitations of liability to which it might otherwise have been entitled under the contract of carriage or at law. Deltrans was also negligent, grossly negligent, reckless with knowledge that damage of the loss would probably result and is therefore liable to B&W in delict and in tort for payment of the damages.

[39] In essence, B&W brings its action in this Court based on its allegation of the breach by Deltrans of the BOL, which it asserts is the applicable contract of carriage. In responding to Deltrans' motion to strike, B&W relies on s 22(2)(f) of the *Federal Courts Act* as the statutory basis for the Court's jurisdiction. This section states that, without limiting the generality of s 22(1), the Federal Court has jurisdiction *with respect to any claim arising out of an agreement relating to the carriage of goods on a ship under a through bill of lading*, or in respect of which a through bill of lading is intended to be issued, *for loss or damage to goods occurring at any time or place during transit*.

[40] In that regard, I note that this Court has held that the jurisprudence supports that its jurisdiction to hear claims against ocean carriers extends beyond marine transportation when goods continue their journey after discharge under a through bill of lading. "In other words, a claim falls within the purview of paragraph 22(2)(f) when it is made pursuant to a through bill of lading contract" (*Elroumi* at para 11).

[41] Here, Deltrans does not dispute that its BOL is a through bill of lading as it encompassed transit by sea and by rail. Rather, it takes the position that the Court lacks jurisdiction because Deltrans' contractual obligations under the BOL ended when Deltrans safely delivered the Cargo to CN's Yard. Therefore, as Deltrans' obligations under the BOL were satisfied and complete prior to the theft of the Cargo at the Canchi warehouse, B&W's claim is not made pursuant to, nor does it arise from, the through BOL and this Court does not have a statutory grant of jurisdiction pursuant to s 22(2)(f), or otherwise. Conversely, B&W takes the position that the through BOL required safe delivery of the Cargo at the B&W Warehouse, which did not occur. Thus the Court has jurisdiction.

[42] B&W's Statement of Claim includes that Deltrans was at all material times the carrier of the Cargo; that the Deltrans' BOL required carriage and delivery of the Cargo in good order and condition to B&W "at the Port of Prince Rupert, British Columbia, Canada with final destination at Montreal, Québec, Canada"; B&W's loss is a direct result of Deltrans' failure to safely load, stow, handle, carry, care for, discharge, store and deliver B&W's Cargo in good order and condition; and, Deltrans is accordingly in breach of its contract and obligations and is liable to B&W for the full amount of its damages. However, it is significant to note that the B&W Statement of Claim does not assert that the BOL required, or that the parties intended, that delivery of the Cargo would be to the B&W Warehouse pursuant to the BOL. The pleading offers no fact or alleged fact supporting jurisdiction of the Court on the basis of the BOL place of delivery or s 22(2)(f).

[43] In this responding to Deltrans' motion, B&W relies on the Schwartz Affidavit which states, amongst other things, that:

- B&W contracted with Deltrans for the carriage of the Cargo to the B&W Warehouse;
- Deltrans issued the BOL;
- It is a well established practice between B&W and Deltrans "(and/or Delmar)" that B&W hires Deltrans for the carriage of its goods up to the B&W Warehouse. Over the past 20 years B&W has dealt with Deltrans "and/or Delmar" over 100 times whereby B&W has hired Deltrans for the carriage of its various cargos with the place of delivery being the B&W Warehouse;
- No entity other than Deltrans "and/or Delmar" was hired by B&W to handle the voyage from Ningbo, China to the B&W Warehouse and there exists no other document of transport between B&W and Deltrans pertaining to the transport of the Cargo from the CN Yard to the B&W Warehouse;
- Prior to notification of the loss, B&W was never made aware that Deltrans was using the services of Canchi warehouse to store its cargo while in transit to its final destination.
- Deltrans and Delmar have exhibited a course of conduct showing that they are in fact a single entity.

[44] Conversely, the Di Salvo Affidavit states that B&W submitted a booking reference to Delmar for it to arrange transport of the Cargo from Ningo, China to Montreal, Québec. I note that a copy of that booking request has not been provided by either party in this motion. In the statement of facts portion of its written representations, Deltrans states that on December 12, 2016, B&W contracted with Delmar to arrange the transport of the Cargo from Ningbo, China to the B&W Warehouse. In support of this, it references portions of an examination for discovery of Mr. Schwartz conducted in this action, which is included in Deltrans' motion record. There, Mr. Schwartz states that B&W contacted Delmar to arrange for the shipment booking; all emails were with Delmar; while there was no master contract between Delmar and B&W, B&W had

retained Delmars' services more than a hundred times and this is typically affected by an email from B&W to Delmar making a booking request. Mr. Schwartz describes his understanding of how the Cargo would be transported from Prince Rupert to the B&W Warehouse, being that the container would be discharged at that port, travel by rail to the Montreal terminal where it would be picked up and brought to a warehouse where the container would be de-stuffed (in this case only about 47% of the container content was the B&W Cargo), the Cargo would then be put on pallets and delivered by truck to the B&W Warehouse. Mr. Schwartz states that he was aware of the logistics but not as to who was performing the various tasks.

[45] From the Di Salvo Affidavit, it is clear that pursuant to the booking request made between B&W and Delmar, the ultimate destination of the Cargo was the B&W Warehouse. However, that affidavit also states that Delmar contacted Deltrans "to arrange for a portion of the transportation of the Cargo", that Delmar contacted IPE to provide logistics services and, that it was IPE who was responsible for retaining Canchi. The Di Salvo Affidavit states that Deltrans did not arrange for the warehousing of the Cargo, it did not retain Canchi, it was not a party to any warehousing contract with Canchi, it was not involved in the unloading and storing of the Cargo at the Canchi warehouse and that the Cargo was never in Delmars' custody, care and control.

[46] I recognize that in a motion to strike brought on the basis of lack of jurisdiction pursuant to s 221(1) of the *Federal Courts Rules* care must be taken in making factual findings when there is relevant and conflicting evidence. However, in my view, in this matter it is ultimately determinative that the BOL on its face states the place of delivery to be Montreal, Québec and

the type of delivery is container yard to container yard and, that the Statement of Claim itself does not assert that the BOL required, or that the parties intended that pursuant to the BOL issued by Deltrans, the Cargo would be delivered to the B&W Warehouse.

[47] In that regard, B&W's submissions assert that the BOL is "deficient", which I take to be an acknowledgement that the place of delivery of the Cargo is not indicated on the BOL as being the B&W Warehouse. Given this, B&W instead invites the Court to accept its submission that Deltrans and Delmar are "one and the same" and that it was the intent of the parties that the Cargo would be delivered to the B&W Warehouse as this was the previous course of dealings between the parties. Based on this, B&W submits that it is open to the Court to declare that the BOL terminated at the B&W Warehouse.

[48] I would first note that B&W does not explain what it views as the legal impact of its assertion that Delmar and Deltrans are a single entity. To the extent that B&W is implying that the two are the same legal entity, the Louis Affidavit provides evidence that they are not. Thus, any suggestion that all transport arrangements for the Cargo made by Delmar are attributable to Deltrans (such as warehousing at Canchi), and that Deltrans is therefore legally liable for the loss, is not supported by any evidence. Put otherwise, B&W offers no legal theory or basis in support of the suggestion that because Deltrans and Delmar are "one and the same", the Court can view any contracts entered into by Delmar with third parties to be contracts entered into by Deltrans. In any event, transport of the Cargo beyond container yard to container yard is not encompassed by the BOL and would not ground jurisdiction under s 22(2)(f). Similarly, the evidence before me is that all of B&W's dealings were with Delmar. To the extent that B&W is

suggesting that the terms of the BOL are not what was agreed with Delmar, this is an issue as between Delmar, which is not a party to this action, and B&W, and is a dispute about what was intended to be covered by a BOL. This again does not fall within the ambit of s 22(2)(f). Further, the Schwartz Affidavit asserts that it is a well-established practice between B&W and Deltrans "and/or Delmar" that the carriage of B&W's goods would be to the B&W Warehouse. Be that as it may, this does not necessarily mean that such carriage would be pursuant to the terms of the applicable bills of lading, as opposed to other arrangements made by Delmar for transport after delivery of the shipment to a container yard. Of note in that regard is that on February 20, 2017, after the theft, B&W put *Delmar* on notice that, as a result of the Cargo being stolen from B&W while in the custody of Canchi, *Delmar* was not to send any of B&W's shipments to the Canchi warehouse for any third party logistics services provided for B&W. This would seem to recognize that it was Delmar that was making such arrangements. Nor did the Schwartz Affidavit provide as exhibits copies of any prior bills of lading.

[49] I acknowledge that it is unclear from the pleadings and the affidavits exactly what the business or other relationship is between Deltrans and Delmar. However, B&W has not added Delmar as a defendant, it has not pled any basis on which Deltrans could be held legally liable for acts or omissions of Delmar, nor suggested that this is a circumstance in which the Court should pierce the corporate veil. And, faced with this motion to strike, B&W has not sought leave to amend its Statement of Claim, nor does the evidence presented support that leave would be warranted.

[50] Further, the fact that an ocean carrier is responsible for an entire segment covered by a bill of lading does not extend the jurisdiction of this Court to hear claims against parties to other contracts of carriage, such as rail and land carriers (*Elroumi* at para 14). Here, the essence of B&W's claim as asserted in its Statement of Claim is breach of the BOL by Deltrans. However, on its face, the place of delivery is Montreal and the type of move is container yard to container yard. There is no evidence before me suggesting that a delivery container yard, other than the CN Yard, was contemplated by Deltrans or B&W. Thus, the through BOL was exhausted when the Cargo was delivered in good order at the CN Yard. In my view, in the absence of any ambiguity in the BOL terms, it is not necessary to resort to the principles of interpretation that B&W proposes, including that the BOL must be construed strictly against the carrier and in accordance with a long standing previous course of dealing between the parties (*Tetley* at p 176). And, even if the latter principle applied, the custom cannot be inconsistent with the bill of lading (*Tetley* at p 191).

[51] Although not argued by B&W, nor is this a factual situation such as in *ITO*. There Mitsui O.S.K. Lines Ltd [Mitsui] carried calculators by sea from Japan to Montreal for Miida Electronics Inc. Mitsui arranged for the goods on arrival to be picked up and stored at the port on a short term basis by ITO, a stevedoring company and terminal operator. Cartons of calculators were stolen from ITO's shed. The bill of lading contained a Himalaya clause by which Mitsui sought to extend limitation of liability to those it employed in performance of the contract of carriage, which specifically included stevedoring companies. At issue before the Supreme Court was the question of the jurisdiction of the Federal Court and the effect of the Himalaya clause. The Supreme Court found that such incidental storage by the carrier itself, or

by a third party under contract to the carrier, was a matter of maritime concern by virtue of the close practical relationship of the terminal operations to the performance of the contract. Accordingly, it could also be concluded that cargo handling and incidental storage before delivery and before the goods passed from the custody of the terminal operator within the port area was sufficiently linked to the contract of carriage by sea to constitute a maritime matter within the ambit of Canadians maritime law. This is not such a situation.

[52] Rather it is factually more similar to *Matsuura*. There an ocean carrier, Nippon Yusan Kaisha Line [NYK], agreed to carry cargo under a through bill of lading from Japan to Toronto. The cargo was carried by ship from Japan to New Jersey and from there, pursuant to an agreement between NYK and a trucking company, the containers were carried by truck NYK's terminal in Mississauga, which the parties all agreed was the Toronto destination mentioned in the bill of lading. Subsequently, at the request of the receiver of the cargo, the trucking company carried the cargo to Oakville, where it was found to be damaged. The shipper and receiver of the cargo sued NYK and the trucking company, NYK served the trucking company with a third party notice. The Federal Court of Appeal held that it was clear that the Court had jurisdiction over the plaintiffs' claims against NYK, pursuant to s 22(2)(f) of the *Federal Courts Act*. The issue before it was whether the Court also had jurisdiction with respect to the plaintiffs' claims, and NYK's claim, against the trucking company. The Federal Court of Appeal held that the only claims to which s 22(2)(f) refer are those arising out of an agreement relating to the carriage of goods on a ship under a through bill of lading and that the claims of the cargo owners as against NYK, as the ocean carrier, arose out of such an agreement. However, the same could not be said

of the claims against the trucking company. This finding appears to have been made even though the first part of the move by truck was covered by the bill of lading.

[53] I would also note this Court's decision in *Mediterranean Shipping*. There the ocean carrier, MSC, agreed to transport cargo by sea, pursuant to a bill of lading, to the port of Montreal. The container was delivered to that port where it was picked up by an unauthorised trucking company. It was never delivered to its rightful owner. The plaintiff sued MSC as the carrier. MSC took the position that the contract of carriage ended when it delivered the cargo to the Montreal terminal but, nevertheless, took a third party action against the trucking company seeking indemnity for any judgement against MSC. This Court held that it had no jurisdiction over the claim for indemnity, whether or not the contract of carriage was at an end. This was because there was no allegation of a contract between the trucking company and either MSC or the plaintiffs. MSC's claim was not based on the execution of a contract of carriage of goods by sea or the duties and liabilities of the operator of a sea terminal. The Court held that a direct claim by the plaintiffs or the third party claim for indemnity by MSC could only be based in tort or extra-contractual liability, such liability arising from the trucking company's role as mandated by the thieves to pick up the cargo, or as a thief stealing directly from the terminal. Such a cause of action did not pertain to Canadian maritime law. The Court also interpreted *Matsuura* to stand for the proposition that the transportation by a land carrier, even if under contract to the ocean carrier, and even where the land carrier's part in the carriage forms part of a continuous movement, is not so integrally connected to maritime matters as to be legitimate Canadian Maritime Law within federal legislative competence and found that the case was much more

similar to *Matsuura*, *Sio Export Trading Co. v The "Dart Europe"*, [1984] 1 FC 256 and *Marley Co. v Cast North America (1983) Inc.*, [1995] FCJ no 489, than the circumstances in *ITO*.

[54] In conclusion, in my view, in these circumstances and based on the pleadings and the affidavit evidence before me, it is plain and obvious that this Court does not have jurisdiction over the claim, as asserted, pursuant to s 22(2)(f) of the *Federal Courts Act* as the loss of the Cargo occurred subsequent to its safe delivery at the CN Yard. That is, subsequent to the completion of Deltrans' obligations under the BOL. And, while B&W also pleads negligence by Deltrans, this is a bald pleading. Without more, it cannot otherwise ground jurisdiction of the Court.

Issue 2: Should the Court grant summary judgment?

[55] Given my finding that the Court has no jurisdiction, I need not address this issue. However, even if I am wrong on that point, I find that there is no genuine issue for trial.

[56] Rule 215(1) states that if on 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. Rule 215(2)(b) states that if the Court is satisfied that the only genuine issue is a question of law, the Court may determine the question and grant summary judgment.

[57] In *Manitoba v Canada*, 2015 FCA 57, the Federal Court of Appeal considered Rule 215 and, citing *Burns Bog Conservation Society v Canada (Attorney General)*, 2014 FCA 170, held

that there is no genuine issue if there is no legal basis for the claim based on the law or the evidence brought forward. The Court found that this was consistent with the Supreme Court of Canada's decision in *Hryniak v Mauldin*, 2014 SCC 7, which held that there is no genuine issue if there is no legal basis to the claim or if the judge has the evidence required to fairly and justly adjudicate the dispute.

[58] Although the burden lies on the moving party to establish that there is no genuine issue for trial, Rule 214 requires that the party responding to the summary judgement "put his best foot forward". This requires the responding party to "lead trump or risk losing" (*The Source* at para 18). This B&W has failed to do, as demonstrated in the context of my above jurisdictional analysis.

[59] Given my finding that the through BOL was exhausted when the Cargo was delivered in good order at the CN Yard, and that it did not extend to cover transit to the B&W Warehouse, the evidence that Deltrans and Delmar are not the same legal entity and, the absence of any other purported legal basis for any liability of Delmar being ascribed to Deltrans, there remains no genuine issue for trial. For the same reason, as to Deltrans' submission that that clause 5.4(P) relieves it of all liability for the loss because it could not avoid or prevent it by the exercise of due diligence, clause 5.4(P) has no application.

JUDGMENT in T-436-17

THIS COURT'S JUDGMENT is that:

1. Deltrans' motion seeking to strike the B&W Statement of Claim is granted without leave to amend.

2. Deltrans shall have its costs in the amount of $5,700, all inclusive.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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