Date: 20080625

Docket: T-1999-04

Citation: 2008 FC 801

Toronto, Ontario, June 25, 2008

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

TIMBERWEST FOREST CORP.

Plaintiff

and

PACIFIC LINK OCEAN SERVICES CORPORATION,
UNION TUG AND BARGE LTD.,
GREAT NORTHERN MARINE TOWING LTD.,
A.B.C. COMPANY, WARREN SINCLAIR, MARC McLEAN,
KENNETH HEMEON, AND THE OWNERS AND OTHERS INTERESTED IN
THE SHIPS "SEA COMMANDER" AND "OCEAN OREGON"

Defendants

REASONS FOR JUDGMENT AND JUDGMENT

[1] On its face, this is a cargo claim. The plaintiff is suing for the loss overboard of most of its shipment of logs from the barge Ocean Oregon while under tow of the tug Sea Commander on a voyage from the Fraser River to Eureka, California. The corporate defendants are Pacific Link, the contractual carrier and the charterer of the tug and barge owned by Union Tug and Great Northern respectively. The individual defendants are Kenneth Hemeon, the master of the tug, and the late

Warren Sinclair and Marc Mclean who loaded and stowed the logs on board the barge. A.B.C. Company is a corporate John Doe or Richard Roe and can be ignored.

[2] In another sense, the sense with which the Court is now concerned, this is a case dealing with bills of lading, marine insurance and whether contractual benefits may be extended to third parties, and, if so, to which defendants. Apart from a deductible of $15,000, which the parties are prepared to leave aside for present purposes, the plaintiff, Timberwest, was indemnified by its marine underwriter, St. Paul & Marine Insurance Company. In reality, this is a subrogated claim in which St. Paul must use Timberwest's name as it is the party with legal title to the goods and the party who initially suffered the loss (*Simpson v. Thomson* (1877), 3 App. Cas. 279). However, one of the explicit insuring conditions was a waiver of subrogation in favour of Pacific Link. The other defendants assert that they too are beneficiaries of that, or another, waiver of subrogation in the policy and are also additional insureds. If that is so, an underwriter who has paid one insured cannot sue other insureds in recovery of a loss covered by the policy.

[3] The parties have agreed, and the Court has ordered, that the triable issues be severed. This portion of the trial is not concerned with the circumstances of the loss which may or may not give rise to liability on the part of some or all of the defendants or with quantum, alleged to be in the million dollar range. Rather it is limited to marine insurance issues which the parties have broken down into the following four questions:

a. Is the contract of carriage governed by the *Marine Liability Act*, S.C. 2001, Schedule 3 (*Hague-Visby Rules*)?

b. Is the cargo "goods" as that term is defined in the *Hague-Visby Rules*?

c. Is the waiver of subrogation clause in favour of Pacific Link in the insurance policy of the plaintiff rendered null and void and of no force or effect by the *Hague-Visby Rules*?

d. If not, may the defendants other than Pacific Link rely upon the waiver of subrogation clause?

[4] The questions devolve from important general principles of contract law, and particular aspects of contracts of carriage and insurance. Shipments of goods by water from Canadian ports, if covered by a bill of lading, are compulsorily subject to the *Hague-Visby Rules* unless the goods in question are live animals or "cargo which by the contract of carriage is stated as carried on deck and is so carried". The logs in their entirety were carried on deck. Although no bill of lading was actually issued, the contract contemplated that one could be issued.

[5] If the *Hague-Visby Rules* apply then article III 8 thereof must be considered. It states that any clause relieving or lessening the liability of the carrier or ship, other than as provided in the Rules, is null and void and of no effect. More specifically, it goes on to declare that "A benefit of insurance or similar clause shall be deemed a clause relieving the carrier from liability."

[6] Turning to the insurance point, it is a general principle of contract law that a third party can neither benefit from nor be burdened by a contract. This rule, as far as benefits are concerned, was relaxed by the Supreme Court in *London Drugs Ltd. v. Kuehne & Nagel International Ltd,* [1992] 3 S.C.R. 299 and again in the context of marine insurance in *Fraser River Pile & Dredge Ltd. v. Can-*

Dive Services Ltd., [1999] 3 S.C.R. 108. Mindful of these two cases and that the answers to each of the four questions are largely independent one from the other, counsel have been quite inventive in their respective interpretations of the underlying contracts in submitting that I should, or should not, hold that the shipment was covered by an under deck bill of lading, that a waiver of subrogation is or is not a benefit of insurance, which does or does not extend to Pacific Link's servants, agents or subcontractors and whether this case does, or does not, fall within the one of the established exceptions to privity of contract.

PLAINTIFF'S CASE

[7] At all material times, Timberwest was the owner of the cargo and the party which initially suffered the loss. It concedes that on one legal theory or another, it is bound by the terms and conditions of the contract of carriage its customer, the intended receiver and purchaser of the goods, Harwood Products Inc., entered into with Pacific Link. It submits that the contract of carriage is governed by the *Hague-Visby Rules*, and that although all the cargo was carried on deck with its knowledge and consent, the cargo was nevertheless "goods" within the meaning of the Rules as the defendants have not established that an on deck bill of lading would have been issued. The waiver of subrogation clause in its insurance policy with St. Paul is null and void in virtue of article III 8 of the Rules. Finally, the other defendants do not benefit from the waiver of subrogation clause. In the alternative, even if they do, it was likewise null and void by application of the Rules.

DEFENDANTS' CASE

[8] The defendants admit Timberwest's interest in the cargo and agree it is bound by the terms and conditions of the contract of carriage. The reason Timberwest is bound is that its customer entered into the contract as its undisclosed agent. Although the shipment was covered by a bill of lading, that bill of lading, if actually issued, would have provided that all the cargo was carried on deck, as indeed was the case. Therefore the cargo does not fall within the definition of "goods" within the *Hague-Visby Rules,* and the waiver of subrogation in favour of Pacific Link does not offend the Rules. Even if it did, the Rules are not of application because the waiver is found in a separate and independent insurance policy, rather than in the contract of carriage. In any event, a waiver of subrogation is not a benefit of insurance provision within the meaning of the Rules.

[9] The common law rules prohibiting third parties from benefiting from a contract do not apply in this case. Pacific Link was specifically named as a beneficiary and the underwriters are bound to their bargain. Defendants Sinclair, McLean and Hemeon were employees of Pacific Link and on the basis of *London Drugs,* above, also benefit from the waiver of subrogation. If not, they, together with the other corporate defendants, which are related to Pacific Link, were contemplated subcontractors, and so are additional insureds under the policy, and also benefit from a waiver of subrogation.

DECISION

[10] I have come to the conclusion:

a. the contract of carriage is not governed by the *Hague-Visby Rules*;

b. the cargo is not “goods” as defined in the *Hague-Visby Rules*. Although the shipment was “covered” by a bill of lading, that bill of lading, if issued, would have stated the entire shipment was being carried on deck, as indeed was the case;

c. the waiver of subrogation in favour of Pacific Link contained in Timberwest’s insurance policy was not rendered null and void and of no force or effect by the *Hague-Visby Rules*. Pacific Link is a third party beneficiary and entitled to assert the clause against St. Paul; and

d. the other defendants are all third party beneficiaries of one or more waiver of insurance clauses, and likewise entitled to assert them against St. Paul. These defendants were the owners of the tug and tow, the master of the tug, and either crew or stevedores servicing the barge. As such, they were all parties to and given exemptions and immunities under the contract of carriage. In turn, they are additional insureds with benefit of a waiver of subrogation granted them by St. Paul.

[11] I have construed the contract of carriage, Timberwest’s contract for the sale of the lost cargo and the marine insurance policy in terms of the language used, and the testimony of the witnesses. I then analyzed my findings in the light of the doctrine of privity of contract and the enforceability of terms and conditions thereof by third party beneficiaries.

SOME BASIC PRINCIPLES

[12] I consider it important to set out my understanding of some of the underlying legal principles.

[13] Although the bill of lading is a venerable document, it is not defined in either the *Hague-Visby Rules* or in our *Bills of Lading Act*. Article I of the Rules provides that they only apply to "…contracts of carriage covered by a bill of lading or similar document of title." Depending on its terms, a bill of lading may, or may not, be a negotiable instrument. A fundamental aspect of a contract of carriage covered by a bill of lading is that the carrier, or its agents, delivers the cargo to the holder of the bill. These attributes of a bill of lading are not relevant to this case.

[14] An on board bill of lading serves as a receipt for the goods and represents that they are in fact on board. It should also reflect their apparent order and condition. The bill of lading is invariably issued after shipment, and after the contract of carriage was made. Therefore, in the hands of the party who entered into the contract of carriage with the carrier, it may or may not evidence the terms and conditions of carriage. In this case, the bill of lading only forms part of the overall contract. Had the bill been consigned or endorsed to someone else, then in virtue of section 2 of the *Bills of Lading Act*, that person would have been "…vested with all rights of action and is subject to all liabilities in respect of those goods as if the contract contained in the bill of lading had been made with himself." In such a case, the bill of lading would be the contract. There is no third party consignee or endorsee, and so the bill of lading, which was never issued, would not really have served as a document of title. Nevertheless, these variables are relevant in considering whether

the overall contract of carriage called upon the shipper to take out insurance for the carrier's benefit, and, if so, whether that requirement runs contrary to the Rules. Certainly, there is no such requirement in the carrier's standard bill of lading form, but there may be in another part of the overall contract.

[15] With respect to the defendants' allegation that Timberwest is bound to the contract of carriage as an undisclosed principal, one might wish to be mindful of Professor Fridman's definition in his *The Law of Agency,* 7th ed.(Toronto: Butterworths, 1996) at page 11:

> Agency is the relationship that exists between two persons when one, called the *agent*, is considered in law to represent the other, called the *principal*, in such a way as to be able to affect the principal's legal position in respect of strangers to the relationship by the making of contracts or the disposition of property.

[16] Finally, an insurer's right of subrogation exists by operation of law, but of course may be waived by contract. Subsection 81(1) of the *Marine Insurance Act* provides that: "On payment… the insurer becomes entitled to assume the interest of the insured in the whole or part of the subject-matter and is subrogated to all the rights and remedies of the insured in respect of that whole or part from the time of the casualty causing the loss."

EVIDENCE

[17] The evidence consisted of a number of agreed facts and documents, as well as testimony either during the trial, or by read-ins of examinations for discovery, or both.

[18] Timberwest called its marine broker, Robert Sikorski of Marsh Canada Ltd. and St. Paul's underwriter at the time of the loss, Patricia Wyka. It read in portions of the transcript of the discoveries of Peter Brown, who was the representative of all three corporate defendants, Captain Hemeon and Mr. Sinclair. A main purpose of the read-ins was to establish that Captain Hemeon's employer was Union Tug, and that Messrs. Sinclair's and McLean's employer was Great Northern. The defendants called Michael Holmes, Timberwest's manager of log trading, who had been their representative on discovery, and the aforesaid Mr. Brown. There was some discussion as to whether Mr. Holmes should be automatically treated as a hostile witness because he is still in Timberwest's employ. However, as it turns out, he was not hostile at all. They also read in part of his discovery, which dealt with issues beyond his personal knowledge.

[19] Based on the evidence, I find that:

a. From September to early November 2003, Timberwest, a British Columbia corporation, entered into contracts for the sale of 11,463.17 cubic meters of Douglas Fur Logs to Harwood, a California corporation;
b. Pursuant to the terms of sale, Timberwest retained title, ownership and risk with respect to the logs until they were delivered at Eureka, California, and paid for by Harwood;
c. Harwood made all the arrangements for transportation of the logs from their storage grounds in and about the Fraser River to a loading point, loading and stowage on the barge, and for transportation to and discharge at destination. Harwood chose the carrier, in this case Pacific Link;

d. the contract of carriage between Harwood and Pacific Link not only covered the logs owned by Timberwest, but also about 815 cubic meters of logs that Harwood itself owned, and in which Timberwest had no interest. Thus, Harwood was both a disclosed principal and an undisclosed agent;

e. Pacific Link, a Barbados corporation incorporated to engage in international transportation in order to take advantage of Canadian tax legislation, was the time charterer of the tug Sea Commander and the barge Ocean Oregon. Their owners are companies incorporated pursuant to the laws of British Columbia. The tug and barge remained in the possession of their respective owners (*Scrutton on Charterparties and Bills of Lading*, 20th Ed. (London: Sweet & Maxwell, 1996) at pp. 59 and ff);

f. Pacific Link, Union Tug and Great Northern are all interrelated. Fifty percent of the shares of each are owned by Peter Brown and the other 50% by Ed Jackson. Mr. Brown is the president of Pacific Link and Union Tug as well as the secretary of Great Northern. Mr. Jackson is the president of Great Northern and the vice-president and secretary of Union Tug. He is also a director of Pacific Link. These companies market themselves together as the Sea Link Group. This fact was known to Harwood and I infer was also known by Timberwest. An export declaration for one of the parcels shipped and lost was prepared by Timberwest's customs broker. It identifies the exporting carrier as "Sea Link Marine Services" and the vessels as the tug "Sea Commander" and the barge "Ocean Oregon". Registered ownership of these two Canadian vessels is a matter of public record.

g. Harwood had been provided with copy of Pacific Link's bill of lading form prior to 2003.

h. The individual defendants are not employees of Pacific Link.

CONTRACT OF CARRIAGE

[20] The contract of carriage for the voyage in question owes its genesis to the sales contract between Timberwest and its customer, Harwood. Timberwest began exporting logs to Harwood in the late 1990s. These sales originally were FOB Timberwest's Storage Yards in and about the Fraser River. Harwood took delivery, title and risk there, arranged and paid for movement of the log booms to a barge, and for carriage to Eureka, California. Timberwest had no interest in insuring the shipments as it was not at risk. However, come the spring of 2002, the arrangements changed. Financially the contracts remained FOB Timberwest's Storage Yards in the sense that, as before, Harwood arranged for transportation to Eureka at its own expense. However, title and risk remained with Timberwest until payment, which was not due until delivery. In that sense, the sale was Delivery ex Ship and Timberwest certainly had an insurable interest in the cargo.

[21] The contract of carriage is dated 6 November 2003 and is between Harwood and Pacific Link. As aforesaid, some of the cargo shipped belonged to Harwood, but most belonged to Timberwest. Timberwest did not see the contract until after the loss. Its name does not appear on the contract, and I accept that Pacific Link had no idea it had any interest in any of the cargo.

[22] The quoted freight rate comprised a number of inclusions and exclusions. The rate was specifically said not to include cargo insurance. The contract in its entirety, including the standard towing terms and conditions which were attached, as well as the terms and conditions of the bill of lading form, incorporated but not attached, will be analyzed later on in these reasons.

THE INSURANCE POLICY

[23] Timberwest first began to retain title and risk on U.S. bound shipments of logs in November 2001. It wanted insurance coverage, but the shipments were beyond the scope the policy then in place which its broker, Marsh Canada Ltd., had negotiated with St. Paul and other underwriters. The first of such shipments was to a customer other than Harwood. Timberwest entered into a contract of carriage with Brusco Tug & Barge Inc., an American corporation. The contract provided that neither the vessels utilized nor the carrier would be liable for loss or damage to cargo, or delay in delivery thereof, howsoever arising or resulting even if caused by unseaworthiness or lack of due diligence. All risk marine cargo insurance was to be carried by Timberwest, as shipper, with the carrier to be named as an additional insured, with a full waiver of subrogation.

[24] More specifically, the required insurance policy was to name the carrier and its affiliates as additional insureds and to expressly waive subrogation as against them, any vessel used in the performance of the contract and the master and crew of such vessel.

[25] Timberwest's marine broker, Robert Sikorski of Marsh Canada Ltd. obtained a copy of the contract, commented thereon, and passed same on to St. Paul's underwriter, Chris Wood,

who was in its Seattle office. In an email to Mr. Wood, Mr. Sikorski said “we will need to add the carrier as AI on the cargo with a waiver and thirty days notice. However, and I assume this should not be a problem as is customary.” St. Paul agreed and by endorsement number 1, added as a condition “additional insured including waiver of subrogation; Brusco Tug & Barge Inc.”. An additional premium was charged.

[26] The first shipment pursuant to a sales contract between Timberwest and Harwood in which Timberwest retained title and risk until payment and delivery took place in April 2002. However, in that case, as in all previous and indeed subsequent Harwood shipments, it was Harwood who arranged and paid for carriage. Mr. Sikorski asked Timberwest for copy of the contract of carriage which it obtained through Harwood’s British Columbia agent, Robeth Holdings Ltd. The evidence is that neither on this occasion nor on any other occasion did anyone at Timberwest, including its treasurer, John Hanbury, who acted as risk manager, pay any attention to the terms and conditions thereof. They simply relied upon Marsh Canada Ltd. to arrange appropriate coverage.

[27] What Mr. Sikorski received was a letter of understanding between Pacific Link and Harwood similar to, but not identical to, the letter covering the later November 2003 shipment and the same attached “standard towing terms and conditions”. He was not provided with, and did not request, copy of the bill of lading form. Indeed, he only requested a copy after the loss.

[28] By this time St. Paul had in mind writing Vancouver business out of its Vancouver office, rather than out of Seattle. The Seattle underwriter, Chris Wood, was to remain responsible for the negotiation of the renewal of the next annual policy which would commence 1 July 2002, but, St. Paul's Vancouver underwriter, Patricia Wyka, was copied in on correspondence so as to allow her to become more familiar with the insured.

[29] Mr. Sikorski informed both of them by email that he had received copy of the tug and barge contract between Harwood and Pacific Link and confirmed the contract had the usual customary hold harmless provisions "as to the Carrier/Shipper". He offered to fax a copy but pointed out that the text was difficult to make out. Mr. Sikorski does not recall sending a copy of the contract to St. Paul. Mr. Wood left St. Paul a number of years ago and did not testify. However, Ms. Wyka reviewed the file and was not able to find a copy. She also stated that she had not personally requested copy thereof.

[30] It was Mr. Sikorski's evidence that he was only interested in those portions of the policy which put the customer at risk, risks which could and should be insured against. He only recalls reading the first three paragraphs of the terms and conditions in the section titled "Contracts for towing, moorage, storage or shiphandling". They indeed contain various non-responsibility and indemnity provisions. However, he said he did not read clause 6 in the section titled "contracts of carriage" and never requested or received copy of the bill of lading form referred to therein. I find a matter of fact that neither Timberwest, Marsh nor St. Paul, had a copy of the bill of lading at relevant times. As a matter of law, I hold that they are as bound as if they had.

[31] As export shipments were becoming a regular part of Timberwest's business and could no longer be considered "one off", effective for the policy year beginning 1 July 2002 and again 1 July 2003, coverage with respect to export logs was specifically dealt with in the marine cargo section of the policy, which stated as an insuring condition "waiver of subrogation against Brusco Tug and Barge Inc., Pacific Link Ocean Services Corporation".

[32] Marine package policy number MARO3\2394, in place from 1 July 2003 and at the time of the loss, insured the plaintiff Timberwest under general conditions and a schedule. The schedule had four sections: hull and machinery, primary marine liabilities, marine cargo, and excess marine liabilities. Of interest are parts of the general conditions and that part of the marine cargo section dealing with export logs, but first we must ask:

DO THE *HAGUE-VISBY RULES* APPLY?

[33] This first question posed by the parties has three components. Is the plaintiff bound by the terms and conditions of the contract agreed between Pacific Link and Harwood? If so, was the shipment "covered" by a bill of lading, which in turn was subject to the *Hague-Visby Rules*? The parties agree that Timberwest, and through it, St. Paul, are bound by the Harwood contract. Pacific Link says this is so because Timberwest was Harwood's undisclosed principal with respect to that portion of the shipment Timberwest owned. Timberwest would rather not commit itself at this stage as to precisely why it is bound. It wants to be bound because the *Hague-Visby Rules* provide that a benefit of insurance clause is null and void. Such a clause is otherwise enforceable at common law as long as privity of contract and third party beneficiary issues are

overcome. Timberwest is faced with two recent Supreme Court cases which at first glance do not appear to support its position (*London Drugs,* above; and *Fraser River,* above).

[34] Pacific Link is correct in characterizing Timberwest as Harwood's undisclosed principal. I need go no further than to refer to the definition of "agency" by Professor Fridman, above, and to *Pyrene v. Scindia Navigation Company*, [1954] 2 Q.B. 402, [1954] 2 All ER 158, [1954] 1 Lloyd's Rep. 321. The commercial reality is that Timberwest was an undisclosed principal and bound to the contract between Pacific Link and Harwood. *Pyrene* is authority for the proposition that an FOB seller of cargo, damaged by the carrier before title passes, is subject to the contract of carriage as an undisclosed principal. It is also authority for the proposition that a shipment is covered by a bill of lading if one was intended to be issued, even if not actually issued. See also *Anticosti Shipping Co. v. St-Amand,* [1959] S.C.R. 372, 19 D.L.R. (2d) 472.

[35] The parties disagree as to whether the bill of lading would have been subject to the *Hague-Visby Rules*. The Rules may be incorporated by contract or forced upon the parties by operation of law. Incorporation by contract would not help Timberwest. Although the contract clearly indicates that Pacific Link intended to claim all the benefits of the *Hague-Visby Rules* or *United States COGSA,* which is a modified version of the older *Hague Rules*, the contract clearly stated that it accepted none of the liabilities imposed thereby with respect to cargo carried on deck. Thus, we have to consider whether the *Hague-Visby Rules* apply by operation of law.

[36] It is common ground that all the logs were shipped on deck on this, and on previous voyages. Indeed, it has been admitted that there was no other way to carry logs on the Ocean Oregon. Timberwest must establish that the contract provided for the issuance of a bill of lading. The first part, the letter of undertaking, is silent save that it incorporates what is called in one part "attached Terms and Conditions" and in another, "subject to Pacific Link's standard towing terms and conditions as attached". It is not enough that Harwood, and Timberwest, knew and consented that the cargo would be carried on deck. An additional requirement to oust the application of the *Hague-Visby Rules* is that the bill of lading so specifically state. Although Timberwest submits that the contract was sufficiently clear to import the notion of the issuance of a bill of lading, it was not clear enough to then oust the application of the Rules by means of an on deck bill of lading. It suggests that many of the exclusionary and limitation clauses are so contradictory that it is not clear on what basis the cargo was carried. That is an argument best saved for the liability portion of the trial. I limit my interpretation of the contract to those issues which are currently before me as there has been no evidence whatsoever as to the circumstances of the loss.

[37] The document attached to the letter of understanding is actually titled "Terms and Conditions (effective February 2002) Contract subject to the following conditions". There are three subheadings. The first "Contracts for Towing, Moorage, Storage or Shiphandling" comprises the first five paragraphs. The second, "Contracts of Carriage", contains paragraph 6 and the third, containing paragraph 7, deals with environmental matters.

[38] Mr. Sikorski only read the first few clauses under the section relating to towing, moorage, storage and shiphandling. Although that section refers to contracts for services and does provide that neither Pacific Link nor its servants, agents and subcontractors would be liable for any loss howsoever caused even through negligence or gross negligence and has a hold harmless provision, it is only clause 6, under the subheading "Contracts of carriage" which deals with bills of lading. Timberwest cannot assert that a bill of lading would have been issued without relying on clause 6, the first portion of which reads:

> All contracts of carriage shall be governed by the terms and conditions of the Pacific Link Ocean Services Corp. standard form Bill of Lading as amended from time to time and shall apply whether or not such Bill of Lading is actually issued in respect of any particular cargo. Where a bill of cargo is not issued the Customer agrees that the issue of a Bill of Lading is contemplated by the contract of carriage. The Bill of Lading is pursuant to the *Marine Liability Act*, s.c. 2001 c.6, or where applicable, the *United States Carriage of Goods by Sea Act*, 46 U.S.C. Φ 1300, *et seq.* Copy of the full standard Bill of Landing can be obtained from the offices of Pacific Link Ocean Services Corp. or by fax at 604-522-5197. **The Bill of Lading contains provisions which limit or exclude the liability of Pacific Link Oceans Services Corp.** […]

[39] The bill of lading provides, *inter alia*, in bold print on its face:

ALL GOODS ARE CARRIED ON DECK AT SHIPPER'S RISK
(see Clause 9 on reverse or attached hereto)

[40] Clause 9 titled "DECK CARGO" provides that "all cargo is carried on deck unless otherwise expressly stated in this Bill of Lading". It was Mr. Brown's testimony that the only under deck cargo which could be carried on the Ocean Oregon was liquid cargo in tanks.

[41] Thus Timberwest cannot rely on the contract to submit that the shipment was covered by a bill of lading, without at the same time acknowledging that it would have been an on deck bill of lading. It suggests, as is quite true, that if the on deck statement were to be deleted from the bill of lading then the *Hague-Visby Rules* were applicable by operation of law, notwithstanding that the goods were carried on deck. However, clause 9 provides that cargo is carried on deck unless otherwise expressly stated. An express statement to the effect that the cargo was carried under deck would constitute a fraud on innocent purchasers of the bill of lading as a negotiable document. A deletion of the on deck statement on the front of the bill of lading would be an amendment to the contract which had already been made, an amendment which obviously in the circumstances had not been agreed.

[42] Consequently, I have no difficulty in holding that the waiver of subrogation is not null and void and of no effect by virtue of application of the *Hague-Visby Rules*. Pacific Link submits that in any event such a waiver does not constitute a benefit of insurance. Leaving aside the point that Pacific Link is also an additional insured, as shall be explained below, I cannot accept this proposition which it derives from the decision of United States Court of Appeals, Fifth Circuit, in *Fluor Western, Inc. v. G & H Offshore Towing Co. Inc.*, 447 F. 2d 35 (5th Cir. 1971). That case dealt with the loss of cargo not subject to the *U.S. COGSA*, or the *U.S. Harter Act.* Thus, it does not stand for the proposition that a waiver of subrogation clause is not invalidated by the *Hague-Visby Rules*. It does, however, stand for the proposition that if underwriters waive their subrogation rights, not via a contract of carriage, but only by a later independent agreement which they reached with the cargo owner, then the waiver is valid. As I have reached my conclusion by way of a different

route, I think it better not to consider this point. What, for instance, would the situation be if Timberwest endorsed the bill of lading to an innocent third party for value on an FOB basis rather than a CIF basis. In that case, the certificate of insurance would not have been endorsed over to a purchaser, who presumably would have taken out its own insurance which likely would not have contained a waiver of subrogation clause.

[43] Another of Pacific Link's arguments is that it is not a third party beneficiary at all. It submits that it was a requirement of the contract of carriage that the shipper take out insurance for its benefit. It relies on such decisions as that of the Ontario of Court of Appeal in *St. Lawrence Cement Inc. v. Wakeham & Sons Ltd.* (1995), 26 O.R. (3d) 321. In that case, a barge ran aground due to the negligence of the tug boat operator. The barge owner had placed insurance on the barge and her cargo, which included coverage for the tug boat operator's negligence. The tug contract provided that the barge owner would be "responsible for insurance on the barge and its cargo". In context, the Ontario Court of Appeal held that the proper inference to be drawn was that the parties intended that the tug operator be a co-insured.

[44] In this case, the contract of carriage simply says: "Rate does not include: … cargo insurance". The words mean exactly what they appear to mean. Mr. Brown, Pacific Link's president, testified that on occasion customers would not have their own insurance in place so Pacific Link, as a courtesy, would as agent arrange that insurance and pass on the cost as a separate item. As aforesaid, Pacific Link had no idea that Timberwest was interested in the cargo and that it had named it in its marine insurance policy.

[45] The letter of understanding between Pacific Link and Harwood for the April 2002 shipment is somewhat more ambiguous. Therein it was stated:

> Rate does not include:
>
> - Cargo insurance excepting as follows: insurance and deductible costs to be split 50-50 between Harwood and Pacific Link if Harwood cannot insure the cargo under its original terms and conditions as provided in the December 28, 2001 Letter of Undertaking.

[46] However, the December 2001 letter was not proffered in evidence. Rather, the evidence is that Harwood did manage to take out insurance. That policy is not in evidence, and I am not prepared, on the balance of probabilities, to find that Harwood (be it on its own account or as Timberwest's agent) ever agreed to take out insurance for Pacific Link's benefit.

[47] However, should I have misconstrued the contract of carriage in that the reference to the rate not including insurance was a requirement that the shipper actually take out insurance for the carrier's benefit, and if the bill of lading would not have stated that the cargo was actually carried on deck, then, even though the bill of lading was not negotiated to a third party without notice, the waiver would be invalid (*St-Siméon Navigation Inc. v. A. Couturier & Fils Ltée*, [1974] S.C.R. 1176).

[48] Since there is no Canadian case law on point, or indeed case law from anywhere that counsel could find, I think this issue deserves comment. In Strathy (now Mr. Justice) and Moore, *The Law & Practice of Marine Insurance in Canada*, (Markham: LexisNexis Butterworths, 2003), at pages 202 and 250, the authors opine that a benefit of insurance clause is invalid as being

contrary to the *Hague-Visby Rules*. Indeed, this is precisely why the defendants submit that the shipment was not subject to those Rules. In *Carver on Bills of Lading*, 2nd ed. (London: Sweet & Maxwell, 2005), the authors at paragraph 9-201 on page 602 simply state that the benefit of insurance clause not only covers clauses purporting to entitle the carrier to the benefit of the cargo owner's insurance but also exceptions in respect of losses which can be covered by insurance and clauses that would make the carriers not liable for loses reimbursed by cargo underwriters. In *Scrutton,* above, at page 441, it is said that a benefit of insurance clause is one through which a shipowner is to have benefits of any insurance effected by the owner of the goods. The learned authors of all three texts cite no cases directly on point. However, I agree with their reasoning. Indeed, one would have thought the proposition to be self-evident.

DO THE DEFENDANTS BENEFIT FROM THE INSURANCE POLICY?

[49] Although the questions jointly submitted by the parties suggest that if the Court reached this stage the question was only whether the defendants other than Pacific Link benefit from Timberwest's insurance policy, the circumstances are such that the question applies to Pacific Link as well.

[50] Pacific Link was specifically and individually named in the St. Paul policy and thus benefits from the waiver of subrogation found in that portion of section 3 of the policy dealing with export logs. Timberwest, through its broker, Mr. Sikorski, specifically requested that waiver. Pacific Link was performing the very services provided for in the contract of carriage when the loss occurred. Consequently, it is clearly a third party beneficiary and is entitled to enforce the waiver of insurance

clause in its own right as per *London Drugs* and *Fraser River*, notwithstanding that it had not required Timberwest to have such a clause inserted and notwithstanding that it knew nothing of the insurance policy until after the loss. In *Fraser River*, the beneficiary, Can-Dive, likewise was unaware of the policy. Furthermore, it only fell within a generic class, the class of "charterers". In this case, Pacific Link is actually named. However, the question remains whether the other defendants are also entitled to benefit from Timberwest's policy.

[51] Turning first to the individual defendants, Captain Hemeon and Messrs. Sinclair and McLean, it had been held in *London Drugs* that a limitation of liability in favour of the defendant Kuehne & Nagel as "warehouseman" implicitly extended to its employees as it could only warehouse the goods through them. Indeed in bailment contracts, be they warehouse or carriage contracts, some flesh and blood must be involved. As Viscount Haldane said long ago in *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*, [1915] A.C. 705 at page 713: "…a corporation is an abstraction, it has no mind of its own any more than it has a body of its own…". The provision in the contract of carriage that Pacific Link would provide crane operators simply meant that as between it and its customers, crane operations were Pacific Link's responsibility. It does not follow that the crane operators, although under its direction, were its employees. The evidence is clear that the individual defendants were employees of the owners of the tug and barge. These were Canadian corporations and it was important for workers compensation and employment insurance purposes that they worked for Canadian corporations. For Canadian tax purposes, Pacific Link was a Barbadian company operating in the international sphere. Although all three corporate defendants are related, I am not prepared to pierce the corporate veil, much less tear it asunder. There were

valid commercial reasons why Messrs. Brown and Jackson operated a number of separate companies.

[52] Thus on a narrow reading of *London Drugs*, neither the individual defendants nor the other corporate defendants are employees. However, as subsequently noted in *Fraser River, London Drugs* was not intended to limit the relaxation of the rule pertaining to third party beneficiaries to employees. In *Fraser River*, the third party beneficiary, Can-Dive, was in an arms length relationship with the plaintiff. What is noteworthy, however, is that such employees or independent contractors that Can-Dive may have used to perform the contract were not sued, unlike the situation in this case.

[53] *London Drugs* and *Fraser River* must be considered in the light of their great precursor, *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R.752 (*Buenos Aires Maru*). That case approved the Himalaya Clause. In *Adler v. Dickson*, [1955] 1 Q.B. 158, [1954] 3 All. E.R. 397, [1954] 2 Lloyd's Rep 267 (the *Himalaya*), Mrs. Adler was injured while boarding the steamship Himalaya as a passenger. The conditions in her ticket appeared to exempt the carrier from liability. She therefore sued the Master and Boatswain on the basis that they were personally negligent. Lord Denning held that the law permitted a carrier to stipulate exemptions from liability not only for himself but also for those whom he engages to carry out the contract, and that this can be done by necessary implication as well as by express language. In that case, however, the carrier had not purported to stipulate for those who actually performed the contract and so it was held that the Master and Boatswain could not rely on the exceptions in the passenger ticket.

[54] Since then, benefits have been successfully extended to employees, servants, agents and subcontractors by means of a Himalaya Clause. Clause 14 of the bill of lading is a short form thereof. It reads:

> […] Every employee, agent and independent contractor of the Carrier, and the owner, operator, manager, charterer, master, officers and crew members of any other vessels owned or operated by related or unrelated companies, and stevedores, longshoremen, terminal operators and others used and employed by the Carrier in the performance of its work and services shall be beneficiaries of this Bill of Lading and shall be entitled to all defences, exemptions and immunities from the limitations of liability which the Carrier has under the provisions of this Bill of Lading and, in entering into this contract, the Carrier to the extent of those provisions, does so not only on its own behalf but also as agent and trustee for each of the persons and companies described herein, all of whom shall be deemed parties to the contract evidenced by this Bill of Lading.

[55] This agency approach makes all the defendants party to the contract evidenced by the Pacific Link bill of lading. Privity of contract and third party beneficiary issues are thus overcome, albeit somewhat artificially. *London Drugs* dealt with extension of benefits by implication, not by the express wording of the Himalaya Clause.

[56] Timberwest forcefully argues that many of the clauses in the contract of carriage are contradictory. However, these are arguments best left to the liability portion of the trial. I refer to them simply to ascertain whether the reference to Pacific Link in the insurance policy is limited to Pacific Link as such, or to whether the reference extends to the co-defendants in their capacity as shipowners, master, officers, crew and stevedores concerned in the carriage of the cargo.

[57] Two arguments are advanced as to why the defendants other than Pacific Link benefit Timberwest's insurance. The first, as aforesaid, is that the following wording in section 3 D "Export Logs", by necessary implication applies to them:

> Including Waiver of subrogation against:
> - Brusco Tug & Barge Inc.
> - Pacific Link Ocean Services Corporation

The second is that they are additional insureds with benefit of a waiver of subrogation by way of clauses 6 and 19 of the general conditions.

[58] As to the first argument, which was not before the Supreme Court in *Fraser River,* to further drive home the Himalaya Clause, the term "carrier" was defined in the bill of lading as including all the defendants by class. "The term "carrier" shall include the ship, shipowner, operator, manager, charterer, master, officers, crew, stevedores and all those concerned in the carriage of the goods".

[59] The correspondence between the broker and the underwriters is telling:

> - Sikorski: "The contract has the usual customary hold harmless provisions as to the Carrier/Shipper";
>
> - Wood: "Tower requires a hold harmless provision in the towage contract";
>
> - Wood: "Our position is that as long as the carrier does not take any responsibility for the tow of the logs, underwriters need independent safeguards that the tow is properly conducted.

[60] Even after the loss, the underwriters were initially of the opinion that the carrier had not accepted responsibility. Realizing that there had been no specific request by Pacific Link that it be named in the Timberwest policy, with a waiver of subrogation, Marsh prepared a post-loss

endorsement deleting that provision. When it was first sent to St. Paul, it inadvertently bore the wrong date, a date preceding the loss. This led Ms. Wyka to email Mr. Sikorski as follows:

> As you know we paid a significant loss without rights of subrogation against the tower because the policy was issued so. Now are you sending me an amendment which says "whoops" sorry the tower wasn't waived after all?

[61] It can thus be seen that the words "carrier" and "tower" were used indiscriminately. The intention as between Marsh, on behalf of Timberwest, and St. Paul was that St. Paul wave subrogation against the carrier. If St. Paul, in Timberwest's shoes, could pursue the others, or at least the barge owner, Great Northern, as a carrier, then the waiver had little or no value.

[62] A carrier is defined in the *Hague-Visby Rules* as including an owner or charterer who issues a bill of lading. In this case, the bill of lading would have been issued by Pacific Link, the charterer. Absent language to the contrary, the presumption would that it, and only it, was the carrier. However, there is nothing to prevent an owner and charterer from both agreeing to be the carrier. *Union Carbide Corp. v. Fednav Ltd.* (1997), 131 F.T.R. 241, [1997] F.C.J. No. 655 (QL), and *Jian Sheng Co. v. Great Tempo S.A.,* [1998] 3 F.C. 418, 225 N.R. 140 do not stand for the proposition that no more than one may be the carrier. They dealt with the "identity of carrier" or "demise clause" wherein a bill of lading on charterers' paper defines the owner, or bareboat charterer, as the carrier.

[63] It must be borne in mind that the waiver of subrogation in favour of Pacific Link is in the same language as the waiver in favour of Brusco Tug and Barge Inc. Brusco specifically required

that it and its vessels, contractors and employees used in the contract benefit from insurance. If the benefit only extended to Brusco, as such, then Timberwest would be in breach of contract and if a loss occurred in which St. Paul pursued subrogated rights, it would be faced with a valid indemnity claim from Brusco's employees and subcontractors.

[64] The conclusion therefore is that "…including Waiver of subrogation against Pacific Link Ocean Services Corporation" was intended to cover all those who were party to the contract of carriage. It follows that in virtue of clause 6 of the "General Conditions" all the defendants were additional insureds and benefited from a waiver of subrogation. Clause 6 provided that in addition to named insureds, the policy also insured:

> d. Other entities as may be named in any sections of this policy and/or endorsements hereon.
>
> […]
>
> It is agreed that underwriters rights of subrogation against Additional Insureds are waived.

[65] I do not think that clause 19, which also deals with subrogation, assists the defendants. Its thrust is that coverage is not to be prejudiced by Timberwest accepting limited liability bills of lading, and that the underwriters are not subrogated to any rights which the insured expressly waived in writing prior to loss. However, this is simply a gloss on section 81 of the *Marine Insurance Act*. Even without that language, the underwriters would have no greater rights against the carrier that would Timberwest. Whether or not Timberwest has a claim, i.e. on the deductible, is a matter left for the second part of the trial.

[66] The final question is whether these benefits fall within the existing case law. If not, would an extension of insurance benefits to the defendants, other than Pacific Link, be an incremental development which a judge might permit or would it be a substantial change best left to Parliament? In my opinion, giving the other defendants benefit of insurance does not offend against *Fraser River*. If I am wrong, then in my opinion an extension of benefits to those defendants would be a permissible incremental change to the common law not only in line with *London Drugs*, but also with such maritime cases as *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021; *Bow Valley Husky (Bermuda) v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210; and *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437.

[67] *London Drugs* and *Fraser River* stand for the proposition that a third party may benefit from a contract if the parties thereto intended to extend the benefit and the activities performed were the very activities contemplated as coming within the scope of the contract. The right crystallizes when the event occurs notwithstanding that the beneficiary was completely unaware thereof until afterwards. It is not necessary that the beneficiary be an employee, or even a related corporation. An independent contractor, such as Can-Dive, was held to be a beneficiary.

[68] At paragraph 42 of *Fraser River,* Mr. Justice Iacobucci, speaking for the Court, stated:

> When sophisticated commercial parties enter into a contract of insurance which expressly extends the benefit of a waiver of subrogation clause to an ascertainable class of third-party beneficiary, any conditions purporting to limit the extent of the benefit or the terms under which the benefit is to be available must be clearly expressed. The rationale for this requirement is that the obligation to contract for exceptional terms most logically rests with those parties whose intentions do not accord with what I assume to

> be standard commercial practice. Otherwise, notwithstanding the doctrine of privity of contract, courts will enforce the bargain agreed to by the parties and will not undertake to rewrite the terms of the agreement.

[69] In maritime matters, the courts have always frowned upon efforts to avoid exemption and limitation clauses by suing the opposite party's servants, agents and subcontractors (*Elder Dempster & Co. Ltd. v. Paterson Zochonis & Co. Ltd*, [1924] A.C. 522; (1924) 18 Ll. L. Rep. 319). It has been sound commercial practice, since at least Lord Denning's decision in the *Himalaya*, to attempt by contract, in one way or another, to protect employees, servants, agents and subcontractors who actually perform a maritime contract. Apart from the Himalaya Clause, maritime law has also developed forbearance of suit and circular indemnity clauses by which the shipper promises not to sue subcontractors and if anyone else does, to fully indemnify the carrier. These clauses were upheld in England in *Nippon Yusen Kaisha v. International Import and Export Co. Ltd.*, [1978] 1 Lloyd's Rep. 206 (the *Elbe Maru*). The circular indemnity clause was upheld by Mr. Justice Chadwick of the Supreme Court of Ontario in *Bombardier Inc. v. Canadian Pacific Ltd.,* [1988] O.J. No.1807 (QL). His decision was varied on appeal 7 O.R. (3d) 559, [1991] 85 D.L.R. (4th) 558 so that the Court of Appeal did not have to deal with the clause.

[70] More recently, Prothonotary Morneau upheld the forbearance of suit clause in *Ford Aquitaine Industries SAS v. Canmar Pride (The),* 2004 FC 1437, 267 F.T. R. 115, [2004] F.C.J. No. 1743 (QL). His decision was affirmed on appeal but Mr. Justice Lemieux did not deal with this point, 2005 FC 431, [2005] 4 F.C.R. 441, [2005] F.C.J. No. 535 (QL). Extending insurance benefits

to subcontractors, by express wording, or at least by necessary implication, is well known in the construction industry (*Imperial Oil Ltd. v. Commonwealth Construction Co.*, [1978] 1 S.C.R. 317).

[71] However, if *Fraser River* should be read as only extending third party benefits to those in an immediate relationship with the insured, such as Can-Dive and Pacific Link, and not to those in a less proximate contractual relationship such as via the Himalaya Clause, then as stated in *Bow Valley Husky*, above, at paragraphs 93 and following, the question is whether an extension of existing principles to the case at bar is necessary to keep the law in step with the "dynamic and evolving fabric of our society". The abolition of the common law contributory negligence rule in *Bow Valley Husky* was said to be an incremental change, but certainly is far more dramatic than extending a benefit of insurance to the employees, servants, agents and subcontractors of a named beneficiary.

[72] Madame Justice McLachlin stated at paragraph 102 of *Bow Valley Husky*:

> I conclude that this is an appropriate case for this Court to make an incremental change to the common law in compliance with the requirements of justice and fairness. Contributory negligence may reduce recovery but does not bar the plaintiff's claim.

So it is in this case.

[73] In *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at paragraph 29, Mr. Justice LeBel quoted *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888 as follows:

> Second, the courts should try to give effect to the reasonable expectations of the parties, without reading in windfalls in favour of

> any of them. In essence, "the courts should be loath to support a construction which would either enable the insurer to pocket the premium without risk or the insured to achieve a recovery which could neither be sensibly sought nor anticipated at the time of the contract".

[74] For good and valuable consideration provided by Timberwest, St. Paul agreed that all the defendants were additional insureds and it waived subrogation as against them. It would be an affront to commercial reality and to good insurance practice to allow it to sue its own insureds to recover losses covered by the policy.

[75] To summarize on this issue, the defendants other than Pacific Link, on the strength of the *Buenos Aires Maru* and *Fraser River,* benefit from the waiver of subrogation in Timberwest's policy. If those cases do not relax the doctrine of third party beneficiaries so as to apply to them, then this is an appropriate case to make an incremental change to the law in compliance with commercial reality, justice and fairness. The change would be consistent with the reality that servants, agents and subcontractors, if the language or circumstances so permit, should benefit from contractual clauses stipulated for their benefit. Furthermore, an insurer should not be entitled to pocket premium without risk.

[76] This decision reduces the quantum from the million dollar range to the deductible of $15,000. It may well be that the parties have no desire to continue the trial over that sum. Costs may be spoken to.

JUDGMENT

THIS COURT DECLARES that:

1. The contract of carriage is not governed by the *Hague-Visby Rules*.
2. The cargo is not "goods" within the meaning of the *Hague-Visby Rules,* as the entire cargo was carried on deck and covered by an on deck bill of lading.
3. The waiver of subrogation clause in favour of Pacific Link in Timberwest's insurance policy is not rendered null and void and of no force or effect by the *Hague-Visby Rules*, or by the common law.
4. The other defendants are also entitled to rely upon the waiver of insurance clause.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1999-04
STYLE OF CAUSE:	TIMBERWEST FOREST CORP. v. PACIFIC LINK OCEAN SERVICES ET AL
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	May 26-28, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	Harrington J.
DATED:	June 25, 2008

APPEARANCES:

Christopher Giaschi Ellen Underhill	FOR THE PLAINTIFF
David McEwen Q.C. Emily Stock	FOR THE DEFENDANTS OTHER THAN A.B.C. COMPANY

SOLICITORS OF RECORD:

Giaschi & Margolis Barristers & Solicitors Vancouver, B.C.	FOR THE PLAINTIFF
Alexander, Holburn, Beaudin and Lang, LLP Barristers & Solicitors Vancouver, B.C.	FOR THE DEFENDANTS OTHER THAN A.B.C. COMPANY