Federal Court of Appeal | Cour d'appel fédérale

Date: 20150319

Docket: A-278-14

Citation: 2015 FCA 78

CORAM: **NOËL C.J.**
GAUTHIER J.A.
SCOTT J.A.

BETWEEN:

PÊCHERIES GUY LAFLAMME INC. AND GUY LAFLAMME

Appellants

and

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

Respondents

Heard at Montréal, Quebec, on March 17, 2015.

Judgment delivered at Ottawa, Ontario, on March 19, 2015.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.
CONCURRED IN BY: NOËL C.J.
SCOTT J.A.

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] Pêcheries Guy Laflamme Inc. [Pêcheries] and Guy Laflamme (together, the appellants) have filed an appeal from the decision of Harrington J. of the Federal Court [the judge] stating that the exclusion of liability clause in a contract entitled [TRANSLATION] "Boat Handling"

covered negligence. At the same time, the judge also dismissed their counterclaim against Capitaines Propriétaires de la Gaspésie (A.C.P.G.) Inc. [A.C.P.G.] and AXA Assurances Inc. (A.C.P.G.'s insurer) for the damage caused to fishing boat *Myrana I* while she was in the possession of A.C.P.G.

[2] A.C.P.G. has operated a marina and a dry dock in Rivière-au-Renard since 1984. When the *Myrana I* was launched on May 19, 2008, the boat fell into the water and was damaged, by both the fall and contact with the cable of the portal crane used to move the vessel.

[3] The appellants submit that the judge made a number of errors in his interpretation of the exclusion of liability clause. They submit, first, that the clause could not cover negligence with respect to the circumstances of this case and that the judge failed to provide adequate reasons in support of his conclusion. Second, if this clause did in fact exclude negligence, it was necessarily a harsh and unconscionable clause, and the judge should have refused to apply it. According to the appellants, it is inconceivable that A.C.P.G. could do whatever it liked with its boat without being held liable, and the judge should have applied the doctrine of fundamental breach.

[4] Lastly, the appellants submit that the judge erred in his assessment of the evidence and that he could not infer that Pêcheries was bound by the terms of the contract and that it should have known what it provided for.

[5] Contractual interpretation is a question of mixed fact and law (*Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] S.C.J. No. 53 [*Sattva*] at paragraphs 49 and 50). The

same is true of the issue whether, in the matter at bar, the exclusion of liability clause was harsh and unconscionable. Normally, the appellants, therefore, had the burden of establishing that the judge made a palpable and overriding error *(Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235). The same standard applies to the assessment of the evidence and the inferences the judge drew.

[6] To avoid any deference to the judge, the appellants submit that he committed errors in law, namely,

i. by failing to apply the three criteria of the strict test set out in *Canada Steamship Lines Ltd v The King*, [1952] UKPC 1, [1952] AC 192 [*Canada SS*];

ii. by failing to apply the *contra proferentem* rule against A.C.P.G.; and

iii. by failing to apply the doctrine of fundamental breach.

[7] At the hearing, counsel for the appellants placed particular emphasis on the application of the third criteria of the *Canada SS* test since, in his opinion, this error was critical for the purposes of the appeal.

[8] Indeed, according to the appellants, if the judge had applied the third criterion, namely, whether the clause could cover risks other than negligence, he could only have concluded that the clause did not cover negligence.

[9] As indicated by the Supreme Court of Canada in paragraph 54 of *Sattva*, even though it may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law, the Court should be cautious in identifying

extricable questions of law in disputes over contractual interpretation. I must therefore carefully examine the issues raised by the appellants to inquire as to whether they should really be treated as separate issues.

[10] In my opinion, the judge did not err with respect to the questions of law that can be identified in his reasoning as a whole. As I will discuss below, he examined the meaning of the words in their context and with respect to the purpose of the agreement and the nature of the relationship created by the agreement (*Sattva*, at paragraph 48).

[11] He did not have to apply the *contra proferentem* rule because, in his opinion, the clause was not ambiguous (see paragraph 25 of the reasons published under citation 2014 FC 456).

[12] The contract entitled [TRANSLATION] "Boat Handling" used for A.C.P.G.'s towage, storage and launching services is subject to Canadian maritime law (paragraphs 10 and 11 of the reasons). After determining the law applicable, the judge examined the nature of the contract and found that A.C.P.G. was acting as bailee (under maritime law) and that it had a duty of reasonable care (paragraph 24 of the reasons). That conclusion is not at issue before us. I note, moreover, that it was on the basis of bailment that the judge imposed on A.C.P.G. the burden of establishing that the accident was not caused by its negligence.

[13] It is in this context that the judge examined the plain meaning of the clause reproduced below:

> [TRANSLATION]

> I, undersigned, Guy Laflamme, residing at Rivière-au-Renard, owner of the vessel V/M *Myrana I*, registration number _____, declare that I take responsibility for any risk resulting from the towage, docking, wintering and/or launching of this vessel and I release the Owner of this slip dock and its Operator, Paulin Cotton, <u>of any civil liability</u> resulting from these associated operations or handling.
>
> [Emphasis added]
>
> . . .

He concluded that the clause covered negligence on the part of A.C.P.G., be it in contract or in tort (paragraphs 25 to 29 of the reasons).

[14] When a party has no civil liability in the absence of negligence, as is the case here, the phrase "civil liability" is clearly synonymous with negligence. There was therefore no ambiguity that permitted the application of the *contra proferentem* rule. This means that the clause is as clear as if the word "negligence" appeared in it.

[15] In any event, in *Sattva* and in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, the Supreme Court of Canada confirmed that a contract must be interpreted as a whole, in the light of the circumstances and the commercial context. Consequently, the three-prong approach set out in *Canada SS* is a guide rather than a decisive test requiring a pre-determined result when the interpretation concerns a clause that excludes or limits liability.

[16] I note that in *ITO - International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752, the Supreme Court of Canada had to determine, among other things, whether ITO, as a party to the contract of carriage of goods subject to Canadian maritime law,

could benefit from the exclusion of liability included on the bill of lading. Clauses 8 and 18 of the bill of lading stated that the carrier (and ITO as subcontractor) would not be liable for any loss occurring after discharge and that all risks and expenses for storage would be borne by the shipper and/or consignee (last paragraph of page 791). After concluding that these terms were wide enough to cover negligence (criteria 1 and 2 of *Canada SS*), the Supreme Court of Canada addressed, very briefly, the third *Canada SS* criteria, at page 800 of its reasons.

[17] It stated that the remaining question, whether there is any other possible head of liability upon which the exemption clause could operate, had to be answered in the negative, for the following reason:

> The only liability which could be imposed on the bailee ["dépositaire" in French] would be based on negligence.

[18] Before this Court, counsel for the appellants put little emphasis on the doctrine of fundamental breach since it is clear, as claimed by the respondents, that the Supreme Court of Canada rejected this doctrine in *Tercon* (paragraphs 62 and 82).

[19] As for the assessment of the evidence and the judge's conclusion that Pêcheries was bound by the terms of the contract, the appellants did not discharge their burden of establishing a palpable and overriding error.

[20] While it is true that some passages from the reasons could have been clearer and some observations seem inappropriate, the fact remains that the judge's conclusion in this respect is properly supported by the evidence.

[21] The judge made the following observations to reach this conclusion:

- The contract was short (one page, three paragraphs), very legible, and bearing the title [TRANSLATION] "Boat Owner's Responsibilities", written in capital letters, in bold type (paragraph 18 of the reasons);

- The May 19 contract was signed by Guy Laflamme as the representative of Pêcheries (paragraph 20 of the reasons and Appeal Book, page 146);

- The contract was nothing new because it had been used for the appellants' vessels for over 20 years, and, every time, Pêcheries received a copy by mail in addition to the copy given to the signatory (paragraphs 14, 21 and 37 of the reasons); and

- At least 36 contracts were found in Pêcheries files, including 16 signed by Guy Laflamme himself (paragraph 40 of the reasons).

[22] In the circumstances of this case, I agree with the judge that Pêcheries was bound by the terms of the document signed by Guy Laflamme on its behalf (paragraph 48 of the reasons).

[23] Finally, the judge concluded that the clause was neither abusive nor draconian. In his opinion, such risk-allocation clauses are classic in the modern business world.

[24] The clause was used by the former owners, including Quebec's Ministère de l'Agriculture, before A.C.G.P. acquired the facility in question.

[25] That Guy Laflamme, who is a member shareholder of A.C.P.G., considers the people who are part of A.C.P.G. to be his friends, if not his family, does not take away from the fact that this was a commercial transaction for both parties. Allocating the risks makes it possible to avoid disputes and the great expenses these entail. Indeed, had it not been for the error identified thereafter (paragraph 28), all the parties agree that the present proceeding would not have taken place.

[26] The appellants add that A.C.P.G. should have explicitly advised them that, given the exclusion, they had to insure their boat. This argument is hard to follow since the *Myrana I* had actually been insured for many years and since, as the appellants confirmed before us, on May 19, Guy Laflamme believed that the *Myrana I* was insured.

[27] The judge dealt with another argument of the appellants, one he did not accept, namely, that the parties did not intend to allocate the risks because A.C.P.G. maintained liability insurance with AXA Assurances Inc. The judge noted that Pêcheries had its own hull and machinery insurance (property insurance) and that it was not until after the accident that it noticed that this policy had been cancelled because it had failed to pay it. The draconian nature of such a clause cannot depend on such extrinsic circumstances.

[28] The appellants seem to be criticizing the judge for not repeating their many arguments word for word. This does not mean that he ignored them; he simply did not give them the weight afforded to them by the appellants.

[29] I conclude therefore that the appellants did not establish that the judge committed a palpable and overriding error justifying this Court's intervention.

[30] I would therefore dismiss the appeal with costs.

"Johanne Gauthier"

J.A.

"I agree.
Marc Noël J.A."

"I agree.
A.F. Scott J.A."

Certified true translation
François Brunet, Revisor

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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DATED:	MARCH 19, 2015

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