

Date: 20090213

Docket: T-1656-08

Citation: 2009 FC 161

Vancouver, British Columbia, February 13, 2009

PRESENT: The Honourable Mr. Justice Lemieux

Admiralty Action *In Personam* and *In Rem*

BETWEEN:

HODDER TUGBOAT CO. LTD.

Plaintiff/  
Defendant by Counterclaim

and

JJM CONSTRUCTION LTD.  
TEXADA QUARRYING LTD.  
PACIFIC TOWING SERVICES LTD.  
Owners and All Others Interested in  
The Ship, The "PACIFIC MARINER II"

Defendants

and

PACIFIC TOWING SERVICES LTD.

Plaintiff by Counterclaim

and

JJM CONSTRUCTION LTD., PACIFIC TOWING SERVICES LTD.  
Owners and All Others Interested in The Ship, The "PACIFIC MARINER II"

Third Parties

**REASONS FOR ORDER AND ORDER**

I. Introduction and Background

[1] The Court has two identical motions before it by two of three defendants in this action (hereafter the “08 Action”): Texada Quarrying Ltd. (Texada) and Pacific Towing Services Ltd. (Pacific). These Defendants seek an order pursuant to Rule 221 of the *Federal Courts Rules*

(the Rules) that the Plaintiff's Statement of Claim be struck against each one of them on the grounds it is scandalous, frivolous or vexatious or an abuse of process.

[2] Texada and Pacific say the Statement of Claim should be struck against each of them since they both are Defendants in another action filed in this Court the previous year ("the 07 Action") pleading, in each case, the same cause of action and factual matrix which gives rise to their alleged liability: the negligent loading in the case of Texada and the negligent storing in the case of Pacific, of two barges, the NA 194 and the NA 195 (the Barges) owned by the Plaintiff Hodder Tugboat Co. Ltd. (Hodder) which had been placed under charter with JJM Construction Ltd. (JJM) who then contracted with Pacific to tow the Barges from Texada Island to Vancouver where JJM has a wharf or ramp.

[3] It happened that, when in tow, the NA 194 capsized near the city of Vancouver on November 2, 2006. The NA 195 was handed off in English Bay by Pacific to a Hodder tug which towed it to the JJM ramp where it was secured on November 3, 2006, but began to list and subsequently sunk after efforts to remove its cargo of rocks failed to avert its being submerged.

[4] The Plaintiffs in the 07 Action, filed on November 9, 2007, are Hodder and JJM; the Defendants are Texada, Pacific and its ship the "Pacific Mariner II". In the 07 Action, the Plaintiffs claim: (a) damages to the Barges in the sum of \$1,200,000 and (b) damages for loss of the use of the Barges in the amount of \$1,000,000.

[5] In the 08 Action, the sole Plaintiff is Hodder with the Defendants being JJM, Texada and Pacific and its ship the "Pacific Mariner II". Hodder's claim against the three defendants is: (a) for damages for loss of hire and business loss resulting from the loss of the NA 194 and NA 195 and (b) damages to the deck of the NA 194.

[6] Counsel before me do not dispute the fact the grounds for liability asserted against Texada and Pacific, as Defendants, are essentially the same in the 08 Action as they are in the 07 Action. In addition, in the 08 Action, Hodder claims against JJM that it improperly secured the NA195 to its ramp in or around False Creek in such a way as to result in the grounding of the NA 195 causing damage to the bottom of its hull, with the result that on the morning of November 5, 2006, it was discovered to have sunk and rolled. Hodder asserts against JJM that Hodder's resulting loss, damage and expenses were all caused or contributed to by the fault, negligence, breach of duty of care and/or breach of contract by the Defendants and also by the breach of the charter agreement by JJM.

[7] It should be made clear that the solicitor for the Plaintiff in the 08 Action is different from the solicitor for the Plaintiffs in the 07 Action. Moreover, I permitted counsel for the Plaintiffs in the 07 Action to make written representations and appear before me on these motions.

[8] The motion records reveal the following additional facts which are not in dispute:

- (1) JJM, pursuant to the provisions of the charter agreement, was obligated to ensure the Barges and to name Hodder as a co-assured. Navigators Insurance Company (Navigator) issued the required policy on January 25, 2006.

- (2) Navigators indemnified Hodder, within the terms of the policy, for the damages incurred as a result of the damages to the Barges in consideration for which Hodder executed on various dates prior to the commencement of the 07 Action on November 5, 2007, a Subrogation Receipt and Release for each barge whereby Hodder's rights and remedies in respect of the damages suffered were transferred and subrogated to Navigators who was authorized to use Hodder's name to effectively exercise its subrogation rights.
- (3) Each Subrogation Receipt and Release signed by Hodder also contained the following provisions:

It is further agreed that the undersigned will not make any claim or take any proceedings, respecting physical damage to the Barge NA 194, against other person or corporation who might claim contribution or indemnity under the provisions of the *Negligence Act* and the amendments thereto, at common law, or at Canadian Maritime Law, from the person, persons or corporation discharged by this release.

It is understood that this Subrogation Receipt and Release does not affect, alter or change any rights the payee has, or may have, against JJM construction Ltd., for hire under the charter agreement in force on the date of loss, or for any business loss claims that the payee has, or that may arise.

- (4) On January 29, 2009, after Texada's and Pacific's motion to strike had been launched, the solicitors for the Plaintiffs in the 07 Action wrote to Texada and Pacific's solicitor (who is the same in both actions) "that it should be clear to everyone that at the present time we are only proceeding with the portion of the claim in the above-noted action [the 07 Action] with respect to subrogated recovery

of the monies paid to Hodder / JJM by their insurers and will not be continuing with the portion of the action with respect to the unidentified portion of Hodder's loss.”

- (5) Counsel for Navigators advised the Court that, while it will not be proceeding with the portion of the claim with respect to the un-indemnified portion of Hodder's loss, it would be pursuing on behalf of JJM its uninsured portion and deductibles.
- (6) In the alternative, counsel for Hodder in the 08 Action argued if both actions cannot continue, it should control the 07 Action. However, counsel for the Plaintiffs in the 07 Action urged the Court, in that circumstance, the Underwriters (Navigators) should control the 07 Action. Control of the proceedings covers the giving of instructions on selection of counsel, on any procedural matters in the conduct of the proceedings, acceptance of offers to settle or accept monies paid into court, the launching of appeals and costs.

## II. The Legal Principles and Arguments

[9] Texada and Pacific's motions to strike were argued together and invoke Rule 221(c), the striking of a pleading which is scandalous, frivolous or vexatious and Rule 221(f), the striking out of a pleading which is an abuse of process. The foundation of their motion is they are unnecessarily defending two actions and are facing two different sets of legal counsel in the same cause of action against each of them. They argue courts are against unjustified multiplicity of proceedings and sanction the splitting up of a cause of action into two separate actions – one in respect of an insured subrogated loss and another action for the uninsured loss as was done here citing *Kellar v. Jackson*, [1961] O.W.N. 89 and [1962] O.W.N. 106 [*Kellar*].

[10] Counsel for Hodder in the 08 Action did not disagree with the principle that the policy of the law is against the multiplicity of actions, but he argues the law recognizes an exception and the 08 Action qualifies for that exception. He relies on the Ontario High Court of Justice decision in *Arrow Transit Limited v. Tank Truck Transport Ltd.* (1968), 65 D.L.R. (2d) 683 [*Arrow Transit*] where Wilson J. who had decided the *Kellar* case wrote the following at paragraphs 5 to 7:

5 While the Court is opposed too multiplicity of actions, there are real problems arising out of conflicts between an insured and the insurer when they do not co-operate to bring one action which would suffice for all purposes. The difficulties in the various situations which arise have not yet all been resolved by judicial decision. In an appropriate an order has been made dismissed a second action as was done in *Kellar v. Jackson*, [1962] O.W.N. 34 (H.C.), leave to appeal to H.C. refused, [1962] O.W.N. 106 (H.C.). In that case the plaintiff had brought an action in this Court for damages to his property and for personal injuries. In a second action in a County Court he sued for damages for personal injuries arising out of the same accident which was the basis of the claim in this Court. The second action was removed to this Court and dismissed with costs. As was pointed out by Schatz, J., in his judgment (p. 106) in which leave to appeal from that decision was refused, there was only one cause of action and the insured was entitled to have control of the action until he had been completely indemnified by his insurer and there should be co-operation between the insured and the insurer. However, not necessarily at all costs but where possible, the Court must endeavour to prevent an injustice being done by dismissing an action so as to deprive a party who has a proper cause of action from recovering.

6 It is quite apparent from the facts as they are now known, that there should only be one trial in this case. The jury notice having been struck out I think the proper direction to be given here is that after the pleadings have been closed the second action should be placed on the list immediately after the first action and that it be tried at the same time as the first action, subject to the directions of the trial Judge. In this particular case the element which moves me to make this disposition is the fact that in the second action the Registrar of Motor Vehicles is an additional party and if Joyce is unable to recover his property damage in the first action, if he is entitled to any, he may be

entitled to recover against the Registrar of Motor Vehicles in the second action damages for personal injuries.

7 The trial Judge, I think, will be able to take care of any inequities as the result of two actions being brought in this case.

[11] Counsel for Hodder in the 08 Action also relied on Justice Clement's decision in *Vaughan v. Scott* (1979), 107 D.L.R. (3d) 153 which followed *Arrow Transit* and the Federal Court of Appeal decision in *Freighters (Steamship Agents) Co. v. Number Four (The)*, [1983] 1 F.C. 852 where the Court refused to strike out an action in Canada and vacate the arrest of the ship "The Number Four" on the ground an identical action had been commenced in Korea. Justice Pratte was of the view the action in Canada will not be dismissed as vexatious if that action can provide a benefit to the plaintiff which it cannot obtain in the foreign proceeding.

[12] Counsel for Hodder in the 08 Action argued if both actions cannot continue Hodder and not the underwriters should control the proceeding, namely the 07 Action. He cited the British Columbia Court of Appeal decision in *Farrell Estates Ltd. v. Canadian Indemnity Co.* (1990), 69 D.L.R. (4<sup>th</sup>) 767 [*Farrell Estates*].

[13] For the purposes of these motions, I take from the *Farrell Estates* case, the following proposition:

Where an insurer has paid the full amount required by a fire policy, but that amount does not completely indemnify the insured for his fire loss it is the insured who is entitled to control any litigation against the person said to have caused the fire. This is the position at common law, and it has not been changed by s. 224 of the Insurance Act. If an insurer wishes to control the litigation then the contract of



insurance must provide for complete indemnity of the insured, and the complete indemnity must be paid. Further, the clause in the proof of loss form did not constitute an assignment of the insured's cause of action to the insurers. The clause constituted only a reminder to the insured of the provisions of s. 224.

[14] The reference to section 224 of the *Insurance Act of B.C.* should in this case be a reference to section 81 of the *Marine Insurance Act* passed by Parliament in 1993, which defines the rights of an insurer on payment – the right of subrogation. Counsel did not disagree that this federal statute dealing with subrogation did not change the common law.

[15] The *Farrell Estates* case was followed by Justice Cullity in *Mayer v. 134312 Ontario Inc.*, 58 O.R. (3d) 226 [*Mayer*] where he stayed a subrogated action endorsing the proposition “there can be no such thing as subrogation to the right of a party whose claim is not wholly satisfied.” The same proposition applies in the U.K. see Bennett, *The Law of Maritime Insurance*, 2d. ed. (Oxford: Oxford University Press, 2006) at paragraph 25.16.

[16] A fair summary of the legal concepts set out above leads to the conclusion that the courts seek to avoid a multiplicity of proceedings, for example, by not permitting the splitting of a subrogated insured claim from an uninsured claim where only one cause of action exists expecting the insurer and the uninsured to co-operate in the prosecution of all claims in one action, but in the case of lack of co-operation, attributing the control of the action to the insured unless totally indemnified in respect of all loss suffered yet imposing a duty on that insurer to protect the insurer's interests.

[17] However, the courts do not apply the avoidance of multiple actions arising out of a single cause of action blindly. There are recognized exceptions to the general rule; one which qualifies is if not permitting the second action to continue would cause a real injustice to the plaintiff.

### III. Application and Conclusions

[18] In listening to the parties, it became evident none were advocating that Hodder's claim against JJM be foreclosed which the Navigators and Hodder had preserved in the Subrogation and Release. However, a solution had to be found to overcome the procedural difficulties and inherent conflicts of interest in the situation where Hodder and JJM are co-plaintiffs on the 07 Action but Hodder is also suing JJM as a Defendant in the 08 Action. Counsel for the Plaintiffs in the 07 Action recognized as much when he advised he would not pursue Hodder's uninsured claim against Pacific and Texada.

[19] Hodder in the 08 Action and counsel for the Plaintiffs Hodder and JJM in the 07 Action suggested the solution was to let both actions continue, case-managed to avoid procedural difficulties and be heard together, but not consolidated. I am not inclined to adopt this course of action. It commits the Court to an uncharted course of action and potentially significant resources which can be avoided if another less prejudicial solution is found.

[20] I do not agree with counsel for the Plaintiffs in the 07 Action that Navigators has been granted the right to proceed and control the subrogated action either through the authority of the *Marine Insurance Act (Canada)* or through the Subrogation Receipt and Release. *Farrell Estates*

is against him on both propositions and, in any event, Navigators specifically recognized the co-plaintiff Hodder could pursue the co-plaintiff JJM in another action, creating procedural and other conflicts in this case for which Navigators is responsible.

[21] Counsel for Texada and Pacific suggested another solution which this Court views as more appropriate in the circumstances because it is more procedurally clean and avoids the difficulties identified by the parties. This course of action is reflected in the Court's order below. I was advised by counsel no limitation issues arise from this proposal.

**ORDER**

**THIS COURT ORDERS that:**

- (1) Counsel for Hodder in the 08 Action and counsel for the Plaintiffs in the 07 Action cooperate to achieve the restructuring of the two actions in such a manner that the Plaintiff in the 07 Action becomes JJM pursuing its subrogated and uninsured claims and the Defendants remain Pacific and Texada, and the Plaintiff in the 08 Action remains Hodder pursuing both the subrogated and uninsured claims against JJM, Pacific and Texada.
- (2) Both the 07 Action and the 08 Action shall continue as a specially-managed proceeding.
- (3) The 07 Action and the 08 Action shall be heard together, but not be consolidated.
- (4) JJM in the 08 Action has leave of the Court to issue third party notices to Pacific and Texada.
- (5) A copy of this Order shall be placed in Court file T-1908-07.
- (6) Upon the performance of steps 1 to 4 above, the motions by Texada and by Pacific to strike as Defendants in the 08 Action are dismissed without costs.

“François Lemieux”

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-1656-08

**STYLE OF CAUSE:** Hodder Tugboat Co. Ltd. v. JJM Construction Ltd.,  
Texada Quarrying Ltd., Pacific Towing Services Ltd.,  
Owners and all Others interested in the Ship and The  
Ship "Pacific Mariner II"

**PLACE OF HEARING:** Vancouver, BC

**DATE OF HEARING:** February 9, 2009

**REASONS FOR ORDER AND ORDER:** LEMIEUX J.

**DATED:** February 13, 2009

**APPEARANCES:**

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