Federal Court  Cour fédérale

Date: 20110304

Docket: T-856-06

Citation: 2011 FC 260

Ottawa, Ontario, March 4, 2011

PRESENT: The Honourable Justice Johanne Gauthier

ADMIRALTY ACTION *IN REM*

BETWEEN:

FEUILTAULT SOLUTION SYSTEMS INC.

Plaintiff

and

ZURICH CANADA, KUEHNE & NAGEL LTÉE, BLUE ANCHOR LINE, OCEANSHIP BEHEER III, THE SHIP MAERSK PALERMO (FORMERLY THE P&O NEDLLOYD AUCKLAND) AND THE OWNERS AND ALL OTHER PERSONS INTERESTED IN THE SHIP "MAERSK PALERMO" (FORMERLY THE P&O NEDLLOYD AUCKLAND)

Defendants

and

OCEANSHIP BEHEER III, THE SHIP MAERSK PALERMO (FORMERLY KNOWN AS THE P&O NEDLLOYD AUCKLAND) AND THE OWNERS AND ALL OTHER PERSONS INTERESTED IN THE SHIP *"MAERSK PALERMO"* (FORMERLY THE P&O NEDLLOYD AUCKLAND)

Third Parties

REASONS FOR JUDGMENT AND JUDGMENT

[1] Feuiltault Solution Systems Inc. (Feuiltault) sues their marine insurers, Zurich Canada (Zurich) under an all risk policy (Institute Cargo Clauses A, see Annex A) for damage to forty (40) units of Thomas II machines shipped to Germany in three separate containers in May 2005.

[2] Feuiltault had originally sued Kuehne & Nagel Ltée (K&N) as well as the ocean carrier but shortly before the trial, it settled with these parties.[1]

[3] The main issue in this matter is whether or not the Plaintiff has met its burden of proving that the loss occurred through a fortuity whatever it may be. Another issue is whether the insurers have established that the proximate cause of the loss was the insufficient or unsuitable packing of the cargo inside the containers (paragraph 4.3 of the Institute Cargo Clauses A in Annex A). For the reasons given hereinafter, the Court finds that the Plaintiff has failed to meet its initial burden of proof. The Court is also satisfied that the machines were insufficiently packed.

[4] The relevant facts of the case are simple. This is especially so when one considers that the parties filed an agreed timeline (Exhibit TX-70, Annex B) as well as two joint books of documents (containing Exhibits TX-1 through TX-66). The forty (40) units were loaded in three dry van general cargo forty (40) foot containers at Feuiltault's premises:

a. MAEU 738631-4 ('314) – 12 units;

b. MSKU 630522-9 ('229) – 14 units; and

c. MAEU 811736-7 ('367) - 14 units.

[5] The first twelve (12) machines were loaded and secured inside container '314 by Feuiltault's employees in accordance with their standard practice (which will be described later on), on May 6, 2005.[2] Feuiltault used a large number of wood pieces to prevent the machines from moving around, up and down, or sideways, inside the container during the voyage. Once loaded, the container '314 stayed for a few days at the Feuiltault yard. It arrived at the Montréal terminal on May 10th.[3]

[6] On May 18th, Feuiltault completed the loading and securing of 14 units inside container '229 – that container had been at Feuiltault's yard since May 6th. It was delivered to the Port of Montréal yard the next day.[4] Container '367 was loaded on May 20th and delivered to the Port of Montréal yard the same day.

[7] By May 23rd, the three containers had been loaded onboard the Maersk Palermo (also referred to as the P&O Nedlloyd Auckland) together with another 1,345 containers[5] for the voyage to Bremerhaven, Germany via Rotterdam.[6]

[8] It is agreed that the three containers were stowed in three different locations onboard the ship: two were under deck ('314 and '229), while the third ('367) one was on deck but protected on all sides, including the top, by other containers.

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[1] With the carrier the settlement was made on the basis of each party paying its own costs, while Kuehne & Nagel Ltée paid an amount of $25,000, all inclusive, in settlement. It is acknowledged that in this case, given the applicable limitation of liability, that the maximum recovery against the ocean carrier would have been $56,819.20.
[2] According to Mr. Picard, it takes about 5 to 6 hours to load and secure a container of this type. It appears from the pre-shipment photos that a large lamp is used at some point during the said operation. Nobody commented on the impact this may have had, if any, on the temperature inside the containers.
[3] See Exhibits TX-37 and TX-41.
[4] The truck that picked up the container had to wait 2 hours at Feuiltault (7am to 9:15am), it is not clear if this was because the loading had not yet been completed or for another reason.
[5] Transcript of November 25, 2010 at p. 78; Exhibit TX-48, p. 10.
[6] The three containers were not moved during that stop.

[9] The voyage to Europe was uneventful. In fact, it could be described as ideal for a voyage at that time of the year. Captain Van Calcar, the master of the ship, described the weather as beautiful with very little movement of the ship and no spray over the deck.

[10] The three containers were unloaded at Bremerhaven on June 2 and 3, 2005. They were kept at the North Sea Terminal located at least 100 metres away from the dock, and thus could not be affected by any spray that may come over the dock if the sea is rough.

[11] Although there were some insinuations during the cross-examination of one of Zurich's experts that the weather at Bremerhaven was not particularly good between June 1st and 7th, this was not established as a fact. In effect, the Court accepts the evidence of Captain Schmidt that the weather during the discharge, and until June 7th, at Bremerhaven was overcast with only a little rain.[7]

[12] The containers were delivered to Feuiltault's buyer, Mohn Media Mohndruck GmbH, in Gütersloh, Germany, on June 7th.[8] There is evidence that there were water droplets on the ceiling of container '314 as well as on the machines loaded therein, there was also some water on the floor when the doors were opened. There were no pictures taken of containers '367 and '229 when delivered and no evidence from anybody who saw the inside of these containers when the doors were opened.

[7] Transcript of November 18, 2010, pp. 204-205. The Official Integrated Log book for the ship confirms that the weather was good on June 1st and overcast on June 2nd (TX-48 at pp. 2 and 6).
[8] By the time personnel from Feuiltault arrived at the client's premises in the afternoon, two of the three containers were already unloaded and had been sent away.

[13] However, we know that all the units were rusted to various degrees. The Court accepts the testimony of Captain Schmidt that the units stowed in the ‘314 container exhibited the worst damage. Although there was some salvage, the parties agreed that the quantum of damages is $912,424.00 plus interest.

[14] After the arrival of the last container, Feuiltault notified its insurers and Captain Schmidt, a certified Lloyd’s agent, was appointed on behalf of Zurich to survey the damage. On August 3, 2005, shortly after he completed his report (Exhibit TX-58), Zurich denied coverage on the following basis:

> The findings of the surveyor reveal, that the damage is attributable to the inherent humidity / water contents of the timber, which was used to secure the goods in the container. In conclusion of the surveyor’s opinion, the sweat water resulting from the humidity of the square timber in conjunction with the insufficient protection of the goods, led to the damage.

[15] During the course of the trial, Zurich established that the three containers were in good order and condition prior to and at the end of the voyage. In fact, before the end of the trial, Feuiltault acknowledged that this was no longer a disputed fact. During the voyage, there was thus no ingress of either fresh or sea water (as opposed to humid air) inside those containers.

[16] The Court is also satisfied that it has been established, through the testimony of Mr. Andrew Jones, that except for these three containers, and one reefer container, whose reefer unit broke down, there were no claims for damage to the contents of any of the other 1,344 containers onboard the ship.

[17] Before the trial, the position put forth by the Plaintiff was that the damage was caused by an ingress of sea water inside the containers. Later, when it became clear that this was unlikely, the Court was asked to focus on the period where the three containers were together at the Bremerhaven North Sea Terminal because while at that seaside terminal, saline air (air that can contain salt water droplets) could enter the container through the small vents in the containers, particularly in windy conditions. There is no evidence as to where exactly these containers were stacked at the terminal.

[18] Feuiltault established that their machines were in good condition before loading and that prior to 2005, they had sent several shipments of similar machines in containers, prepared in the same way, that were delivered without damage to customers all over Europe.

[19] It then argued that there is enough evidence before the Court to conclude that the type of rust experienced in this matter required the intervention of what was referred to as an "aggressive agent", like chlorine or sodium. This, Feuiltault says, was in and of itself a fortuity. Thus, the burden of proof shifted was on the insurers to show exactly how the damage had occurred and to establish that the excluded peril on which they relied was the proximate cause of the damage.

[20] Unfortunately, it is not that simple. But before delving further into what was or was not established by a preponderance of proof, it is worth describing briefly the evidence presented by the parties.

[21] Feuiltault presented three lay witnesses, Mr. Feuiltault, Mr. Picard and Ms. Kapfer, while Zurich presented four: Captain Van Calcar, Mr. Jones, Mr. Rouette and Captain Schmidt.

[22] Mr. Dominique Feuiltault, the president of Feuiltault, described the operation of the company as well as its history. Except for the fact that some of the bolts on the forty (40) units may not have been coated with silicone and Cortec grease,[9] the Court accepts his and Mr. Picard's testimony with respect to the condition of the forty (40) machines when they were loaded and secured inside the three containers. The Court also accepts his evidence and that of Ms. Kapfer that similar equipment was shipped to Europe by Feuiltault without significant problems.[10] That said however, and despite the fact that Feuiltault apparently keeps a file on all its shipments including pre-shipment photographs, none of the witnesses gave any details such as the time of the year these prior shipments took place, the colours of the previous containers[11] or, more importantly, the type of wood that was used to secure the machines inside the containers.

[23] Ms. Sandra Kapfer, who worked for Feuiltault at the time, testified as to her involvement in the sale of these machines,[12] in preparing the shipping documentation prior to the loading of the units inside the containers, as well as her involvement in Germany when she and Mr. Picard flew to Feuiltault's customer's factory to install the machines upon their arrival. Although Ms. Kapfer was generally a credible witness, the Court does not accept her views that Captain Schmidt acknowledged in any way, during his survey, in Gütersloh, on June 9th, that the most likely cause of the damage was an ingress of sea water. Having heard Captain Schmidt who denied this and considering his training and the fact that the nitrate tests he performed had been negative, this is

[9] Captain Schmidt could not confirm the presence of such products on the units and Mr. Picard did not explain how he could do so before shipping the machines. The Court carefully considered the photographs and the explanations given by Mr. Mapp (some bolts were likely not protected) and Mr. Lafrenière (some bolts may have been protected by pieces of wood). The Court prefers the explanation of Mr. Mapp given the various positions of the non-rusted bolts on the units.
[10] Only about 20% of Feuiltault's shipments were sent overseas.
[11] This apparently may have an impact on the temperature inside the container.
[12] One of the reasons that she was involved is that she speaks German. She was sent to Germany to help with the customer relationship during the installation.

simply not plausible. That said, this has no impact on the overall determination of the issues at hand here.

[24] Ms. Kapfer indicated that in the past Feuiltault had encountered a problem with the wood it used as dunnage for a shipment made to France.[13] In April 2005, when she asked K&N for a quotation, she also sought information on the latest European Union requirements in respect of wood used as dunnage (see TX-67). There is no evidence that the type of wood (heat pressure treated) used for the three shipments under review was ever used before by Feuiltault. In fact, Ms. Kapfer did not appear to know exactly what was ordered by Feuiltault. She simply remitted the information she had obtained from K&N to the person in charge of purchasing who placed the order for the wood that was delivered on May 4 and May 17, 2005. There is no evidence that Ms. Kapfer or the person in charge of purchasing was alert or alive to the fact that only wood that had an opportunity to dry properly after being treated should be used. There is no evidence that anyone at Feuiltault, including Mr. Picard, was aware that condensation was an issue when shipping containers overseas. Feuiltault never sought advice from a packaging specialist nor did they have a written manual dealing with such matters.

[25] Ms. Kapfer also testified as to the provenance of the steel pieces sent to Mr. Lafrenière, the expert who testified in respect of the substances found on this material (see para. 38 below). The machine from which the pieces were taken was one Feuiltault had tried to repair and had cleaned. This refurbished machine was sent to another German client to be used as a demonstrator. The demonstration failed and the machine was brought back to Mohn Media to be returned to Feuiltault

[13] Transcript of November 15, 2010 at p. 174.

along with the other damaged machines at the end of 2007 or in early 2008.[14] Ms. Kapfer did not, however, give any evidence in respect of the provenance of the piece of wood used by Mr. Lafrenière. This is particularly important given that she also testified that Feuiltault only ordered as much wood as was necessary for each container for it did not keep a wood inventory and did not like to have money lying around. Thus, some explanation was required as to why Ms. Kapfer would have kept wood from the 2005 shipment until the summer of 2008 especially considering that forty new machines were sent to replace the damaged lot in June 2005 well before Captain Schmidt issued his report criticizing the wood used by Feuiltault. We know that in respect of these replacement shipments, a vapour-phase corrosion inhibitor film was wrapped around each machine protecting them against any condensation (see Exhibit TX-64). In fact, the packaging of these June shipments appears to have been in line with what was described by Zurich's expert on packaging during his testimony. The total cost of the material used to package the replacement shipments was $750 for the three containers.

[26] Mr. Marc-André Picard testified about his involvement with the shipments at issue. More particularly, he explained that although he is a mechanic by training, and a technician for the installation of these machines, he learned how to secure them inside containers from a gentleman who used to work for Feuiltault. He and Ms. Kapfer were part of the "group of eight" who were taking care of the most important tasks at Feuiltault. Apart from making the hand drawing (rough sketch) used to plan the securing inside the containers, he was also present when container '314 was unloaded at Gütersloh on June 7, 2005. He testified about the condition of the containers before loading and the condition of the '314 upon its arrival at Mohn Media.

[14] Transcript of November 15, 2010 at p. 198-199. In the circumstances, there is no independent evidence that the three

[27] Mr. Picard did not testify about the number of pieces of wood he used to secure the machines in each container. He simply noted that he used as much wood as was necessary.[15] In that respect, it is worth mentioning that Captain Fernandes, one of Zurich's experts who has more than thirty (30) years of experience surveying containers, noted that he had never seen so much wood used as dunnage in any container he had surveyed.

[28] Captain Van Calcar, the master of the Maersk Palermo, described the circumstances of the voyage and commented on various ship documents produced. He was a credible witness. As mentioned in paragraph 9 above, according to him there was simply nothing out of the ordinary that occurred during the voyage.[16]

[29] Andrew Jones, Customer Solutions Manager at Maersk Canada, testified about various documentation produced in respect of the containers during the relevant period, as well as the centralized claim system in place at Maersk Canada.

[30] Jean-François Rouette, senior superintendent at Montréal Gateway Terminal, gave evidence as to the loading of the containers and their location on board the ship. Before the end of his testimony, the Plaintiff admitted where the containers were stowed for this voyage. Mr. Rouette was not cross-examined.

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bolts and the rod had not been cleaned at any time as this appears to have been assumed and is reported in Mr. Lafrenière's report.

[15] Thus, here again (similar to the lack of proof as to the provenance of the wood given to Mr. Lafrenière, see para. 41 below), a fact (70 pieces per container) relied upon by Feuiltault's expert, Dr. Lagdhir, was not independently established.

[16] During final arguments, counsel for the Plaintiff even admitted that "on the ship, the weather exchange was perfectly ordinary and normal" (Transcript of November 25, 2010 at p. 233).

[31] Captain Gottfried Schmidt[17] discussed his survey and investigation after receiving notification of the claim. Although Feuiltault's counsel tried to diminish his credibility, particularly on the basis that his investigation was not particularly thorough, the Court accepts the findings of Captain Schmidt as to the extent of the damage, the state of the container that he surveyed, as well as the factual information he gathered during his investigation (distinct from his conclusions). None of the facts he relied upon were inaccurate or incorrect in any significant way. It also appears apparent from comments made during his testimony that on June 9th when he conducted his investigation at Mohn Media, he had not fully appreciated yet that these machines, which were already being cleaned up would all end up as total losses with little salvage value.

[32] It is worth noting that before Captain Schmidt was able to attend at the consignee's facilities on June 9, 2005, all the containers had left the premises, and the consignee had discarded all the wood except for one piece (see photograph 15 in the report entered as TX-58). He performed several silver nitrate tests on this piece of wood which was wet to the touch. None of the tests revealed the presence of chlorine. Also, 32 of the 40 units had already been cleaned to some extent before he arrived. Fortunately, he was able to examine each unit and as mentioned earlier, based on his experience and the type of damage he saw, and having the benefit of detailed notes identifying each machine, he determined that the twelve units in container '314 were the most rusted.

[33] Feuiltault called two experts: Dr. Aziz Laghdir and Mr. Luc Lafrenière. Zurich called five experts: Dr. Paul Cooper, Mr. Alfred McKinlay, Captain Mel Fernandes, Steve Bodzay and Mr. Christopher Mapp.

[17] Master since 1976, M.B.A. in Transportation (1990), cargo surveyor since 1991.

[34] Dr. Aziz Laghdir holds a Ph.D. in the mechanics of materials, complex environments, structures and systems.[18] He has been a researcher at SEREX (Service de recherche et d'expertise en transformation des produits forestiers) since 2008. Prior to joining SEREX he worked for the Centre de Recherche sur le Bois. He also taught courses at the University of Laval in the Department of Wood and Forest Science from 2000 to 2009 and is the author of several publications on the properties of wood.

[35] Dr. Laghdir was qualified as an expert in the properties of wood. He co-authored a report with Dr. Suzhou Yin (Exhibit TX-77), which discusses the capacity of the bracing wood used to pack the containers to retain and exude water. Ultimately, he concludes that the theoretical quantity of water which could be released from the wood used for bracing cannot on its own explain the

[18] Mécanique des matériaux et des milieux complexes, des structures et systèmes.

amount of water (sweating/condensation) seen by Mr. Picard in container '314.[19]

[36] Dr. Laghdir was generally a credible witness. However, it quickly became apparent that he had not been given all of the information he should have had about the wood used in the containers. He did not know that the wood used in container '314 was pressure treated only a few days before it was used by Feuiltault. As to the amount of water in the wood after the pressure treatment, he appears to have relied mostly on a conversation between another person at his company and Goodfellow Inc., the wood specialist who treated the wood described in the treatment certificate dated April 26, 2005 issued for 880 fbm (foot board measure) of wood (Exhibit TX-77 at p. 6; Exhibit TX-7). It is not clear exactly what question was asked of Goodfellow Inc. for the answer quoted differs from the one given to Captain Fernandes (see Exhibit TX-82A, page 9, paragraph in last bullet), an expert for Zurich, who also contacted Goodfellow Inc. Although Dr. Laghdir clearly knows a lot about wood, he admitted that he was not particularly knowledgeable about the heat pressure treatments. This in my view clearly had an impact on his estimation of the quantity of water in said wood. In that respect, the Court preferred the testimony of Dr. Cooper, who had much deeper understanding in respect of such pressure treatment.

[37] Feuiltault's expert, Mr. Lafrenière holds a B.Sc.A. in metallurgical engineering (1984). He is the Coordinator of the Expertise Division at the Centre de Métallurgie du Québec, where he has worked for over 15 years. He is also the author of three books on the subject of equipment breakdown and degradation of materials. Although Mr. Lafrenière has conducted over 600 studies of corrosion and equipment failures in various manufacturing enterprises, he had no previous experience in dealing with alleged sea water damage or marine transportation.

[19] Exhibit TX-77 at p. 16.

[38] Mr. Lafrenière was qualified as an expert metallurgist. He submitted one expert report (Exhibit TX-76), which deals with the nature and potential origin of the corrosion damage suffered by Feuiltault's cargo. His report is based on an examination of photographs as well as an analysis of samples supplied to him in the summer of 2008 including four types of steel parts (a rod, 3 bolts, a piece of galvanized steel and a painted steel surface) from one of the damaged machines, a piece of extra wood allegedly from the lot used to pack the containers in May 2005, the seal of one of the containers,[20] the silicone and Cortec products allegedly used by Mr. Picard and his team.[21] In his report, he includes several graphs which depict his analysis of the parts, the wood and the protective products using an x-ray spectroscopy method known as EDS (Energy Dispersive x-ray Spectroscopy).

[39] Based on his examination of the photographs provided to him, Mr. Lafrenière made seven observations[22] the first and seventh of which are the most important and indeed related. According to him, the period during which the machines were in the containers (2 to 4 weeks) was insufficient to cause the type of corrosion exhibited in the photograph, without the implication of an aggressive agent. Thus, Mr. Lafrenière suspects that this was the result of one or more chemical contaminants in addition to water or humidity.

[20] Seal 0043 originated from the '367 container.
[21] The Cortec product given to Mr. Lafrenière (and depicted at p. 30 of Exhibit TX-76) was a spray whereas it was absolutely clear that Mr. Picard used a grease from Cortec which was applied with a brush. Also, Mr. Lafrenière appears to have been told that all black oxide pieces were so protected. Again, it is clear from TX-11 and the testimony of Mr. Picard that such protection was only applied to the exterior pieces, while the tabletop chain only receives a coating of silicone. Thus, the piece of rod was not coated.
[22] Exhibit TX-76 at pp. 8-9.

[40] Mr. Lafrenière's final conclusion, taking into account the photographs and chemical test results, is that the corrosion was caused by the presence of sea water inside the containers.[23] This conclusion was based on his detection of calcium, sodium, potassium or chlorine, elements found in sea water, on some of the corroded parts in addition to the absence of these elements from the bracing wood and the silicone and Cortec products.[24]

[41] Apart from the lack of independent proof as to the provenance of the wood used by Mr. Lafrenière and some deficiencies in the information conveyed to him by Ms. Kapfer,[25] the Court had some difficulty with his approach. First, it is clear that he was not asked to determine what may have happened but rather to support Feuiltault's belief that this corrosion resulted from the presence of sea water. He made no secret of the fact that this was the only hypothesis he really considered. This explains why he tried to explain away some facts that were not consistent with his conclusion. For example, although he noted the unusual fact that many bolts were not corroded, he attributed this to the presence of diagonal pieces of wood that could have protected them. When asked to explain this hypothesis looking at the photograph, he could not do so. The absence of chlorine, sodium, potassium, magnesium and sulphate on the seal of the container he tested was explained away by the fact that these substances could have been washed away by rain. Again, he had not been provided with any hard data (such as a weather report) that could support this hypothesis.

[42] He also had a tendency to generalize without any real basis for doing so. For example, he notes that the galvanized pieces were only rusted where the steel was cut, pierced or bent, probably because of a deficiency in the zinc protection in these areas.

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[23] Exhibit TX-76 at p. 17.

[43] Despite his limited experience with sea water, or maybe because of it, he concluded that sea water was involved even though some significant elements of this compound such as sulphate and magnesium were not found on any of the pieces tested. He also appeared comfortable to make a conclusion on the basis of tests that are described as inconclusive by Dr. Bodzay and Mr. Mapp, especially when one considers that the steel parts used were manipulated and moved quite a lot between June 2005 and the summer of 2008.

[44] More significant even is the fact that although he had to perform a cross-section analysis of the steel pieces to measure the thickness of their coating, he did not comment or appear to examine these pieces to confirm the presence or absence of "pitting". According to Mr. Mapp, whose evidence the Court accepts, any forensic metallurgist ought to know that this "pitting" would necessarily occur if an aggressive agent was involved. This is particularly troubling when one considers that Mr. Lafrenière evidently did some testing that is not discussed in his report (such as testing of the silicone in saline vapour showing that it did not offer any protection whatsoever). The Court got the distinct impression that Mr. Lafrenière may not have included in his report all the elements that would be detrimental to his client's position.[26]

[45] Zurich's first expert, Dr. Paul Cooper, holds a Ph.D. in wood science (1991) and initially worked at the Wood Science and Technology Center at the University of New Brunswick. He has been a professor in the Faculty of Forestry at the University of Toronto since 1995. Dr. Cooper has over one hundred publications dealing with the properties of wood, with a particular focus on treated wood and wood preservation. He is a member of the Canadian Standard Association

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[24] Exhibit TX-76 at p. 17.
[25] See note 21.
[26] For example, he does not comment on the effectiveness of the Cortec product and although he appeared to have tested all three bolts only 2 graphs were included in his report (Exhibit TX-76 at p. 12, para. 3.3).

Technical Committee on wood preservation, and as such has detailed knowledge of the standard that was applied by Goodfellow Inc. (Exhibit TX-7).

[46] Dr. Cooper was qualified as an expert in the field of wood science. He submitted one report (Exhibit TX-80), which responds to the SEREX report by Drs. Laghdir and Yin, discusses the properties of wood, specifically the moisture content, and practices of the lumber industry in the drying and preservation treatment of wood. He concludes, in his report, that contrary to the SEREX analysis and as a result of the pressure treatment of the wood with a water-based wood preservative, "the wood most likely contained sufficient water to produce the observed effects[.]"[27] The Court generally found Dr. Cooper to be a well-qualified and credible witness and accepts his testimony that the wood used by Feuiltault, which was agreed not to have been kiln dried after receiving the heat pressure treatment at Goodfellow Inc., could not have dried sufficiently to reduce the level of water it contained below 30%. The Court notes that, as mentioned by Dr. Cooper, the fact that this wood contained such a high level of moisture could not be detected by simply looking at or touching the wood. The Court also accepts his views that some of the wood was visibly covered in mould[28] upon arrival at Mohn Media and that in some of the pre-shipment photographs, some of the wood appeared to be wet.

[47] Mr. Alfred H. McKinlay holds a B.A. in Industrial Administration and is a professional engineer in Manufacturing Engineering. He has been employed in transport packaging and handling for his entire professional career, spanning almost 60 years. He is the author of a book entitled *Transport Packaging*, co-author of a book on the prevention of freight claims and a contributing author to three other books on packaging.

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[27] Exhibit TX-80 at p. 12.

[48] Mr. McKinlay was qualified as an expert in transport packaging. His report (Exhibit TX-81) discusses typical practices regarding the packaging used for protecting and preserving industrial goods in the distribution process. He observes that the shipments prepared by Feuiltault provided very little protection against corrosion, whereas, customarily, one would provide a barrier around the machinery to protect against the well-known danger of condensation in containers during maritime transport.[29] Mr. McKinlay describes three methods which are used to prevent damage due to condensation: expendable shipping containers made from wood or fiberboard, a plastic film barrier with waterproof tape and vapour-phase corrosion inhibitors.[30] This includes the method used by Feuiltault for its replacement shipments. The Court also accepts his testimony that when one does not have precise measurements with respect to dewpoint, one can use the rule of thumb of the industry - that generally a difference of temperature between 10 to 12^{o}C will suffice. It is to be noted that the expert views expressed by Mr. McKinlay with respect to customary packaging has not really been disputed by Feuiltault and that his testimony in that respect was not much disturbed by cross-examination.

[49] Captain Mel Fernandes became a ship master in 1968. In 1971, he started his career as a marine surveyor, which involves the investigation of damage to cargo or ships during transit to ascertain the cause of the damage for insurance companies. He has been Director of the Marine Division at McLarens Canada for over 20 years.

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[28] Captain Fernandes confirmed during his testimony that such mould would indicate that the humidity inside the container was at or above 80%.
[29] The fact that such danger is well-known has not been disputed. It is worth noting that German underwriters publish a Container Handbook on cargo loss prevention, which contains a whole section dealing with condensation.
[30] Exhibit TX-81 at p. 5.

[50] Cpt. Fernandes was qualified as an expert marine surveyor, with expertise in cargo damage and cargo damage investigations. His first report (Exhibit TX-82A) deals with the subject of condensation and its effects on cargo during marine transportation as well as his assessment with respect to the probable cause of the rust damage in this case. He concludes that it is reasonable to attribute the corrosion damage to heavy condensation within the containers during transit and that the most likely source of the heavy condensation is the high moisture content in the heat pressure treated lumber.[31] Cpt. Fernandes concludes that the machinery was insufficiently packed (unwrapped steel machines in a container full of wood that has not been kiln dried and no use of dessicants) and that the wood used as dunnage was clearly unsuitable because of its high moisture content.

[51] In his second report (Exhibit TX-82B), Cpt. Fernandes responds to the SEREX report by noting that theoretical calculations can sometimes differ from reality. He maintains that the photographs of the container upon delivery and the pattern of damage showed a classic case of container sweating.

[52] Counsel for Feuiltault attempted to reduce the credibility or weight to be given to Cpt. Fernandes' testimony on the basis that he did not use the appropriate weather reports (Mont St-Hilaire, too far from where the cargo was loaded in Beloeil) and spoke of generalities without truly being able to pinpoint what exactly had happened inside these containers (dewpoints, temperature *etc*). Still, the Court generally accepts the testimony of this expert. It is evident that Cpt. Fernandes did not have first hand knowledge of the circumstances under which these three shipments were loaded inside the containers and were carried. That said, Cpt. Fernandes is a very experienced

[31] Exhibit TX-82A at p. 10.

surveyor who has seen numerous cases of container sweating. The Court accepts his assessment that when the door of the '314 was opened, the situation depicted in the photographs and by Mr. Picard points to container sweating as the most likely cause of the damage.[32] With respect to packaging, Mr. McKinlay's testimony certainly corroborates that of Cpt. Fernandes.

[53] Dr. Steve Bodzay holds a Ph.D. in Chemistry (1986). Although clearly well-qualified as a chemist to comment on the weight to be given to the type of test performed on behalf of Mr. Lafrenière, his testimony was not particularly useful considering the evidence of Mr. Mapp which will now be discussed and that of other Zurich experts with more relevant experience with condensation damage.

[54] Mr. Christopher Mapp holds a B.Eng. in Metallurgy (1967). Since 1975, he has been the President and owner of an independent testing laboratory specializing in metallurgical consultation, failure analysis investigations and non-destructive services. Counsel for Feuiltault even recognizes him as the "go-to person for metallurgical examinations" of this nature.[33] This expert is well-known and respected in the marine community in Canada.

[55] Mr. Mapp was qualified as an expert metallurgist. His report (Exhibit TX-85) responds to Mr. Lafrenière's report. He notes that Mr. Lafrenière's testing and his review of the photographs cannot support this expert conclusion which at this stage is nothing more than a hypothesis. Assuming that these substances were there upon arrival in Germany, there could be many other as plausible, if not more probable, explanations for the presence of sodium, calcium or chlorine such as de-icing salt on the wood or on the floor of the containers. It is important to note here that Mr.

[32] See e.g. photograph 55 in Exhibit TX-74 (electronic format) and the photograph on p. 22 of Exhibit TX-76 (better

Mapp, like Dr. Cooper and Dr. Bodzay, was initially retained by the carrier. This explains why his mandate was not to explain the loss but only to respond to the Plaintiffs' expert reports.

[56] That said the Court accepts the testimony of Mr. Mapp which was clear and straightforward. In an answer to a question from the Court he testified that, in his experience, sea water contains compounds composed of elements, which will not be lost over time; thus, one could not conclude that sea water was involved unless all these essential elements were detected. For example, he mentioned that sea water contains the element sulphur (S) as sulphate (SO_4) in significant quantity, but there was no sulphur found in the analyses done by Mr. Lafrenière. If sea water was indeed involved, the type of test carried out by Mr. Lafrenière using the machine at Laval University should have detected such elements as sulphur and magnesium. Mr. Mapp also confirmed that silicone offers little protection against corrosion. Additionally, he made it clear that the type of rust exhibited on some of the photographs relating to container '314 was likely to have been caused by the presence of an aggressive agent in the air or the water – probably from the wood. Here, the Court must note that Mr. Mapp was clearly not aware of how the samples tested by Dr. Lafrenière were handled since 2005, and he clearly assumed[34] in giving his answer that there was indeed some sodium or chlorine or potassium on these pieces at the relevant time, that is, in the summer of 2005.

[57] As will be discussed later on, this fact has not been established in my satisfaction. Certainly, Mr. Mapp indicated that only a small amount of chemical/aggressive agent would be required to increase the type of rust one would experience. He even referred to the fact that simple finger marks from a bare hand could contain salt and have a real impact on the type of damage that would then

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visible on the electronic version); Transcript of November 16, 2010 at pp. 78-79.
[33] Transcript of November 23, 2010 at p. 3.
[34] This because it is reported that the bolts and rod had not been cleaned. As mentioned this has not been confirmed by any witness.

result from humidity or water. One can see what may well be examples of such finger marks on the pre-shipment (Exhibit TX-73, photo 9 (electronic version), particularly the two machines of the left and the first machine on the right) and post-shipment photographs (Exhibit TX-74, photo 44 and photo 76).

[58] As mentioned earlier, Mr. Mapp indicated that observation by binocular microscope to determine the type of rust and whether there was “pitting” is a test that any good forensic metallurgist ought to carry out. Like many of the other experts, Mr. Mapp concluded in his report that the moisture “most probably” originated from condensation within the containers and/or wet

bracing wood. He also felt that the most likely source of contaminant or aggressive agent was the bracing wood itself.

[59] I will now examine some of the case law referred to by the parties. My comments will be brief given that the parties were agreed that this case essentially turns on its own facts and there was little disagreement at the hearing as to the principles of law I should apply.

[60] Both sides relied on *British and Foreign Marine Insurance Co. v Gaunt*, [1921] 2 AC 41 (HL), particularly on what the Supreme Court of Canada in *Canadian National Railway Co. v Royal and Sun Alliance Insurance Co.*, 2008 SCC 66, [2008] 3 SCR 453, refers to as the classic statements on the meaning of "all risks" in an all risks insurance policy (paras 79-80):

> In construing these policies it is important to bear in mind that they cover "all risk". These words cannot, of course, be held to cover all damage however caused, for such damage as is inevitable from ordinary wear and tear and inevitable depreciation is not within policies. There is little authority on the point, but the decision of Walton J. in *Schloss Brothers v. Stevens*, on a policy in similar terms, states the law accurately enough. He said that the words "all risk by land and water" as used in the policy then in question "were intended to cover all losses by any accidental cause of any kind occurring during the transit… . There must be a casualty." Damage, in other words, if it is to be covered by policies such as these, must be due to some fortuitous circumstances or casualty.
>
> At page 57 Lord Summer added:
>
> There are, of course, limits to "all risks". They are risks and risks insured against. Accordingly the expression does not cover inherent vice or mere wear and tear or British capture. It covers a risk, not a certainty; it is something, which happens to the subject-matter from without, not the natural behaviour of that subject-matter, being what it is, in the circumstances under which it is carried.

[61] These well known passages essentially explain why a Plaintiff needs to establish on a balance of probabilities the occurrence of a fortuity in a case such as this one.

[62] Before reaching my decision, I also paid attention to the recent decision of the Supreme Court of the United Kingdom in *Global Process Systems Inc. v Syarikat Takaful Malaysia Berhad*, [2011] UKSC 5 issued on February 1, 2011, where the Court reviews the concept of fortuity in the context of a cargo insurance policies excluding damage proximately caused by an inherent vice of the subject matter insured.[35]

[63] Of particular interest was the fact that the decision in *Mayban General Insurance v Alstom Power Plants*, [2004] 2 Lloyd's Rep 609, on which Zurich initially relied, was found to have been wrongly decided.[36] The highest Court in England gave a very different treatment to two other cases relied upon by the Defendant: *T.M. Noten B.V. v Harding*, [1990] 2 Lloyd's Rep 283 (CA)[37] and *Nelson Marketing International Inc. v Royal and Sun Alliance Insurance Co. of Canada*, 2006 BCCA 327.[38] Those two decisions, which deal with condensation and inherent vice and whether the Plaintiff had established a fortuity, were found to be perfectly compatible with the principles enunciated in *Global Process Systems Inc.* above.

[64] It is also worth mentioning that in *Noten* as well as in *Global Process Systems Inc.* above, it is clear that damage from an inherent vice need not be a certainty. In fact, it may be "just as capricious in its incidence as damage caused by perils of the seas".[39]

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[35] The Court had brought the attention of the parties to the decision of the English Court of Appeal which has now been confirmed by the Supreme Court of the United Kingdom.
[36] See *Global Process Systems Inc.* above at para. 34.
[37] See *Global Process Systems Inc.* above at paras 115 to 118.
[38] *Global Process Systems Inc.* above at paras 120-121.
[39] *Global Process Systems Inc.* above at para 117 and *Noten* above at p. 287 citing Sir Joseph Arnould, *et al, Arnould's Law of Marine Insurance and Average*, 16th ed., Vol II (London: Stevens, 1981) at p. 639, para 782.

[65] There is little case law dealing with the main exclusion relied upon by Zurich here and which reads as follows:

> 4.3 Loss, damage or expense caused by insufficiency or unsuitability of packing or preparation of the subject matter insured (for the purpose of this Clause 4.3 "packing" shall be deemed to include stowage in a container or lift van but only when such stowage is carried out prior to attachment of this insurance or by the Assured or their servants).

[66] This is probably because prior to the adoption of the Institute Cargo Clauses such peril was often dealt with as part of the general exclusion relating to inherent vice set out in section 55(2) of the *Marine Insurance Act, 1906* (UK), c 41.[40] This means that although there are indeed similarities between these two exclusions (which renders the decision of the UK Court in *Global Process Systems Inc.*, above, relevant), the exclusion in Clause 4.3 above must now be treated as a distinct exclusion and construed as such.

[67] The comments of the Supreme Court of Canada in the *Canadian National Railway Co.* decision above, in respect of the standard applicable to an exclusion of "faulty and improper design" in an all-risks policy are relevant. In effect, even if the exclusion at issue here is very different from the one under review in that case, the approach taken by the Supreme Court of Canada is still instructive. To determine what is faulty or improper, the Court applied the standard of the ordinary reasonably cautious and prudent person. As mentioned by the Supreme Court of Canada, this standard is lower than a perfection standard that takes into account all foreseeable risks but may sometimes be higher than an industry standard that can include cutting corners to cut costs.[41] There appears to be no good reason to apply a different standard to assess if the packing or preparation of the cargo is insufficient.

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[40] On which section 53 of the Canadian *Marine Insurance Act*, SC 1993, c 22 was based.

[68] Having carefully considered all the evidence in respect of the packing and preparation of the machinery loaded by the assured inside the three containers under review, the Court finds that it was

[41] In this particular case, the industry standard described by Mr. McKinlay appears to be pretty much in line with the standard of the reasonably prudent shipper of steel machinery.

insufficient. Also the wood used to brace the cargo inside the container was unsuitable when one considers the absence of wrapping or protection of the machinery against the additional moisture it introduced in this closed environment in which the units were carried (a general dry van container). At a minimum, the individual machines should have been wrapped in the same manner they were wrapped for the replacement shipments of June 2005. There is no doubt in the Courts' mind that had this been so, the cargo would not have rusted despite the condensation. There is no need to say more because of my next conclusion.

[69] In effect, the Court also finds that the Plaintiff has not established by preponderance of proof that any fortuitous event or anything of an accidental nature occurred during the insured transit.

[70] Although in some cases, it may be possible for the Court to infer that some fortuitous event affected the goods on one occasion when there is evidence that a number of consignments were made in closely comparable conditions and suffered no damage, this is not the case here. As in *Noten* above, at page 289, the evidential foundation for such an inference was not properly laid. In fact the absence of evidence from Feuiltault that in those previous shipments heat pressure treated wood was used to secure the machines reasonably raises an adverse inference rather than a favourable one.

[71] This case is analogous to what occurred in *Noten* and in *Nelson Marketing* above. There is nothing to suggest that any untoward or unusual event of any kind caused the condensation to occur inside the containers. The weather was not unusually bad or unusually humid or unusually hot or cold at any point during the insured transit. It has not been established that there was anything unusual about the containers themselves. There is no evidence of any ingress of water or any

unusual intake of humid air inside these containers during the insured transit including while awaiting final delivery in Bremerhaven.

[72] Justice Peter Lowry in the *Nelson Marketing* case above, a well-known marine practitioner before his appointment to the bench, refused to simply presume or infer that the conditions in the holds of the vessel were abnormal.

[73] In *Noten* and *Nelson Marketing*, the humidity in the air permeated the cargoes before it was again released in the continuous process that condensation involves. Here it has been established that it was most likely that the condensation involved the humid air present in the container as well as the humidity (water) in the packing used by the assured (the wood) but such distinction (humidity in cargo vs. humidity in packing used) is of no moment given the nature of the exclusion under review.

[74] What occurred is exactly what Captain Fernandes said has "plagued the industry" for as long as he has been around. It is what Mr. McKinlay says shippers of steel parts and steel equipment have been guarding against during the sixty years he has been in the business.

[75] Feuiltault's counsel suggested that the presence of elements such as those found by Mr. Lafrenière (sodium, calcium, *etc*) and the evidence that an aggressive agent was likely involved to cause the extensive rust seen on some of the pictures from container '314 should be sufficient to establish on a balance of probability that something fortuitous occurred.

[76] First, it has not been established to my satisfaction that the sodium and calcium, to name only those substances, were there at the relevant time nor that the wood used by Feuiltault did not contain similar substances or any other substances that could qualify as an aggressive agent. Nobody provided evidence that the chemicals impregnated in the pressure treated wood could not have such an impact.[42] What we know is that upon arrival the wet piece of wood tested by Mr. Schmidt did not contain chlorine.

[77] Considering the nature of Feuiltault's installations in Beloeil, the fact that the wood travelled on a flat bed truck in the spring[43] and that Feuiltault's employees appear to be walking on the machine and inside the container without any indication that they were alive to the fact that substances such as de-icing salts or cleaning products could have a negative impact,[44] the scenario offered by Feuiltault's counsel is nothing more than one of many possibilities. Moreover, if as suggested, saline air could enter the containers through the very small vents in the containers, there is no evidence that this is unusual in any way. Why would the air at this terminal be any different than it normally is?

[78] Finally, the Court notes that the evidence that an aggressive agent was likely involved only relates to some units in container '314 which were, as mentioned, the worst damaged of the three lots. In his report at page 9 (third paragraph), Mr. Mapp is clear that fresh water (no salts or chlorine) would have also caused rusting in this case. The black oxide pieces inside of the machines were not protected at all while the tabletop chains were barely protected by silicone, which is not even advertised for its anti-corrosive protection (see Exhibit TX-76 at p. 30).

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[42] The Court notes that in graph 2 and 3 on page 12 of TX-76, chromium is present, i.e. one of the substances impregnated in the wood at Goodfellow Inc.

[43] There is no evidence of how and where it was stored at the retailer's yard.

[79] It is obviously very sad that a dynamic and creative business like Feuiltault had to learn about condensation and proper packaging the hard way.[45] But despite the Court's sympathy for the Plaintiff's plight, the action must fail. The Court notes that Mr. Dominique Feuiltault appears to have surmounted this adversity as he so eloquently stated "L'homme se mesure lorsqu'il fait face à l'obstacle".

[80] As there may be some issues with respect of offers of settlement pursuant to Rules 400 and 420, the Court will assess the Defendant's costs in a distinct order. At this stage it appears that such costs should not be higher than the amount calculated on the basis of the middle of Column III in Tariff B. Despite the representations of Zurich's counsel, the Court finds that only one counsel was necessary at trial.

[81] As to the experts fees, obviously only those expert who actually testified can be included in the disbursements. As the Court finds that the evidence of Dr. Bodzay was really not particularly helpful, only half of his fees shall be included in the Defendant's disbursements.

[82] With these guiding principles in mind, the parties should be able to agree on the costs. If an agreement cannot be reached, they shall be at liberty to file on or before March 31st, 2011, brief written submissions which should include at least the approximate amount of the taxable costs calculated as above or a lump sum claimed for costs and disbursements.

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[44] Each row had to be jacked one over the other. See also photograph 28 of Exhibit TX-73. There are unidentified traces on the second unit from the right in photograph 37 of Exhibit TX-73.
[45] This is also how they learned to keep an eye on European Union Regulations.

JUDGMENT

THIS COURT'S JUDGMENT is that the action is dismissed with costs to be assessed in a distinct order in accordance with the comments contained in these Reasons for judgment.

"Johanne Gauthier"
Judge

ANNEX A

1/1/82

INSTITUTE CARGO CLAUSES (A)

RISKS COVERED

1. This insurance covers all risks of loss of or damage to the subject-matter insured except as provided in Clauses 4, 5, 6 and 7 below.

2. This insurance covers general average and salvage charges, adjusted or determined according to the contract of affreightment and/or the governing law and practice, incurred to avoid or in connection with the avoidance of loss from any cause except those excluded in Clauses 4, 5, 6 and 7 or elsewhere in this insurance.

3. This insurance is extended to indemnify the Assured against such proportion of liability under the contract of affreightment "Both to Blame Collision" Clause as is in respect of a loss recoverable hereunder. In the event of any claim by shipowners under the said Clause the Assured agree to notify the Underwriters who shall have the right, at their own cost and expense, to defend the Assured against such claim.

EXCLUSIONS

4. In no case shall this insurance cover

   4.1 loss damage or expense attributable to willful misconduct of the Assured

   4.2 ordinary leakage, ordinary loss in weight or volume, or ordinary wear and tear of the subject-matter insured

   4.3 loss, damage or expense caused by insufficiency or unsuitability of packing or preparation of the subject matter insured (for the purpose of this Clause 4.3 "packing" shall be deemed to include stowage in a container or lift van but only when such stowage is carried out prior to attachment of this insurance or by the Assured or their servants)

   4.4 loss, damage or expense caused by inherent vice or nature of the subject-matter insured

   4.5 loss, damage or expense proximately caused by delay, even though the delay be caused by a risk insured against (except expenses payable under Clause 2 above)

   4.6 loss, damage or expense arising from insolvency or financial default of the owners managers charterers or operators of the vessel

   4.7 loss, damage or expense arising from the use of any weapon of war employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter.

5. 5.1 In no case shall this insurance cover loss damage or expense arising from
unseaworthiness of vessel or craft,
unfitness of vessel craft conveyance container or lift van for the safe carriage of the subject-matter insured,
where the Assured or their servants are privy to such unseaworthiness or unfitness, at the time the subject-matter insured is loaded therein.

5.2 The Underwriters waive any breach of the implied warranties of seaworthiness of the ship and fitness of the ship to carry the subject-matter insured to destination, unless the Assured or their servants are privy to such unseaworthiness or unfitness.

6. In no case shall this insurance cover loss damage or expense caused by

6.1 war civil war revolution rebellion insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power

6.2 capture seizure arrest restraint or detainment (piracy excepted), and the consequences thereof or any attempt thereat

6.3 derelict mines torpedoes bombs or other derelict weapons of war.

7. In no case shall this insurance cover loss damage or expense

7.1 caused by strikers, locked-out workmen, or persons taking part in labour disturbances, riots or civil commotions

7.2 resulting from strikes, lock-outs, labour disturbances, riots or civil commotions

7.3 caused by any terrorist or any person acting from a political motive.

DURATION

8. 8.1 This insurance attaches from the time the goods leave the warehouse or place of storage at the place named herein for the commencement of the transit, continues during the ordinary course of transit and terminates either

8.1.1 on delivery to the Consignees' or other final warehouse or place of storage at the destination named herein,

8.1.2 on delivery to any other warehouse or place of storage, whether prior to or at the destination named herein, which the Assured elect to use either

8.1.2.1 for storage other than in the ordinary course of transit or

8.1.2.2 for allocation or distribution,

or

8.1.3 on the expiry of 60 days after completion of discharge overside of the goods hereby insured from the oversea vessel at the final port of discharge,

whichever shall first occur.

8.2 If, after discharge overside from the oversea vessel at the final port of discharge, but prior to termination of this insurance, the goods are to be forwarded to a destination other than that to which they are insured hereunder, this insurance, whilst remaining subject to termination as provided for above, shall not extend beyond the commencement of transit to such other destination.

8.3 This insurance shall remain in force (subject to termination as provided for above and to the provisions of Clause 9 below) during delay beyond the control of the Assured, any deviation, forced discharge, reshipment or transhipment and during any variation of the adventure arising from the exercise of a liberty granted to shipowners or charterers under the contract of affreightment.

9. If owing to circumstances beyond the control of the Assured either the contract of carriage is terminated at a port or place other than the destination named therein or the transit is otherwise terminated before delivery of the goods as provided for in Clause 8 above, then this insurance shall also terminate unless prompt notice is given to the Underwriters and continuation of cover is requested when the insurance shall remain in force, subject to an additional premium if required by the Underwriters, either

9.1 until the goods are sold and delivered at such port or place, or, unless otherwise specially agreed, until the expiry of 60 days after arrival of the goods hereby insured at such port or place, whichever shall first occur,

or

9.2 if the goods are forwarded within the said period of 60 days (or any agreed extension thereof) to the destination named herein or to any other destination, until terminated in accordance with the provisions of Clause 8 above.

10. Where, after attachment of this insurance, the destination is changed by the Assured, held covered at a premium and on conditions to be arranged subject to prompt notice being given to the Underwriters.

CLAIMS

11. 11.1 In order to recover under this insurance the Assured must have an insurable interest in the subject-matter insured at the time of the loss.

11.2 Subject to 11.1 above, the Assured shall be entitled to recover for insured loss occurring during the period covered by this insurance, notwithstanding that the

loss occurred before the contract of insurance was concluded, unless the Assured were aware of the loss and the Underwriters were not.

12. Where, as a result of the operation of a risk covered by this insurance, the insured transit is terminated at a port or place other than that to which the subject-matter is covered under this insurance, the Underwriters will reimburse the Assured for any extra charges properly and reasonably incurred in unloading storing and forwarding the subject-matter to the destination to which it is insured hereunder.

    This Clause 12, which does not apply to general average or salvage charges, shall be subject to the exclusions contained in Clauses 4, 5, 6 and 7 above, and shall not include charges arising from the fault negligence insolvency or financial default of the Assured or their servants.

13. No claim for Constructive Total Loss shall be recoverable hereunder unless the subject-mattet insured is reasonably abandoned either on account of its actual total loss appearing to be unavoidable or because the cost of recovering, reconditioning and forwarding the subject-matter to the destination to which it is insured would exceed its value on arrival.

14. 14.1 If any Increased Value insurance is effected by the Assured on the cargo insured herein the agreed value of the cargo shall be deemed to be increased to the total amount insured under this insurance and all Increased Value insurances covering the loss, and liability under this insurance shall be in such proportion as the sum insured herein bears to such total amount insured.

    In the event of claim the Assured shall provide the Underwriters with evidence of the amounts insured under all other insurances.

    14.2 **Where this insurance is on Increased Value the following clause shall apply:** The agreed value of the cargo shall be deemed to be equal to the total amount insured under the primary insurance and all Increased Value insurances covering the loss and effected on the cargo by the Assured, and liability under this insurance shall be in such proportion as the sum insured herein bears to such total amount insured.

    In the event of claim the Assured shall provide the Underwriters with evidence of the amounts insured under all other insurances.

BENEFIT OF INSURANCE

15. This insurance shall not inure to the benefit of the carrier or other bailee.

MINIMISING LOSSES

16. It is the duty of the Assured and their servants and agents in respect of loss recoverable hereunder

16.1 to take such measures as may be reasonable for the purpose of averting or minimizing such loss,

and

16.2 to ensure that all rights against carriers, bailees or other third parties are properly preserved and exercised

and the Underwriters will, in addition to any loss recoverable hereunder, reimburse the Assured for any charges properly and reasonably incurred in pursuance of these duties.

17. Measures taken by the Assured or the Underwriters with the object of saving, protecting or recovering the subject-matter insured shall not be considered as a waiver or acceptance of abandonment or otherwise prejudice the rights of either party.

AVOIDANCE OF DELAY

18. It is a condition of this insurance that the Assured shall act with reasonable despatch in all circumstances within their control.

LAW AND PRACTICE

19. This insurance is subject to English law and practice.

NOTE: - It is necessary for the Assured when they become aware of an event which is "held covered" under this insurance to give prompt notice to the Underwriters and the right to such cover is dependent upon compliance with this obligation.

ANNEX B

FEUILTAULT SOLUTIONS SYSTEMS - TIMELINE

DATE	EVENT
26 April 2005	Date of treatment of wood by Goodfellow
29 April 2005	Booking Confirmation from K & N for 1 container Container 7386314 left Racine Terminal, Port of Montreal for delivery to Feuiltault by Maxijade Inc (arranged by K+N).
2 May 2005	Container MSKU 6305229 left Racine Terminal, Port of Montreal for delivery to Feuiltault by Maxijade Inc (arranged by K+N)
3 May 2005	Container MAEU 7386314 dropped at Feuiltault yard.
4 May 2005	Invoice (#1) from J.O. Carreau for wood shipment
5 May 2005	Goodfellow Treatment certificate received by Feuiltault Invoice date for Container 314
6 May 2005	Container MAEU 7386314 stuffed, 12 units (machines) Container MSKU 6305229 left Racine Terminal and dropped at Feuiltault yard. Insurance Certificates issued
9 May 2005	Booking Confirmation from K & N for 2 containers
10 May 2005	Container MAEU 7386314 arrives Montreal terminal 10:52
11 May 2005	Invoice date for Container 229
17 May 2005	Invoice (#2) from J.O. Carreau for wood shipment
18 May 2005	Container MSKU 6305229 stuffed, 14 units
19 May 2005	Same day Pick-up date for container 229 (after 13 days in yard). Container 229 arrives Montreal terminal 09:40 Container MAEU 8117367 dropped at Feuiltault yard. Invoice date for Container 367
20 May 2005	Container MAEU 8117367 stuffed, 14 units Container 367 arrives Montreal terminal 13:33
20 May 2005	15:48 MV P&O Nedlloyd Auckland (Maersk Palermo) arrived at Section 78, Montreal. Loading commenced at 16:25.
20-22 May 2005	Containers at Cast terminal, Section 78, Port of Montreal.
21 May 2005	B/L from Blue Anchor Line issued for Containers 229 & 367 Container 314 loaded on board ship 15:07
22 May 2005	B/L from Blue Anchor Line issued for Container 314 Container 229 loaded on board ship 11:10 Container 367 loaded on board ship 13:02
23 May 2005	Vessel departed Montreal at 02:40.
2 June 2005	Vessel arrives at 18:18 at North Sea Terminal in Bremerhaven, Germany.
2/3 June 2005	Containers discharged to dock where they remained until June 7, 2005

7 June 2005	Containers trucked to Mohn Media, the consignee.
8 June 2005	Notice of loss by Feuiltault to Kuehne & Nagel
9 June 2005	Survey conducted by Reck & Co. on behalf of cargo insurers. The 3 Containers already had been unstuffed by consignee and shipper.
13 June 2005	Container MAEU 8117367 traced to a terminal at Bremen and surveyed at GK-Container Service Bremen. This was the only container available to be surveyed.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-856-06
STYLE OF CAUSE:	FEUILTAULT SOLUTION SYSTEMS INC. v ZURICH CANADA ET AL
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	NOVEMBER 15-25, 2010
REASONS FOR JUDGMENT AND JUDGMENT BY:	GAUTHIER J.
DATED:	MARCH 4, 2011

APPEARANCES:

David F.H. Marler	FOR THE PLAINTIFF
Marc D. Isaacs Bonnie Huen	FOR THE DEFENDANT, ZURICH CANADA

SOLICITORS OF RECORD:

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ISAACS & CO. Toronto, Ontario	FOR THE DEFENDANT, ZURICH CANADA