Federal Court  Cour fédérale

Date: 20120612

Docket: T-2018-09

Citation: 2012 FC 738

Ottawa, Ontario, June 12, 2012

PRESENT: The Honourable Mr. Justice Hughes

ADMIRALTY ACTION *IN REM* and *IN PERSONAM*

BETWEEN:

WELLS FARGO EQUIPMENT FINANCE COMPANY AND C&C MACHINE MOVERS AND WAREHOUSING INC.

Plaintiffs

and

THE OWNERS AND ALL OTHERS INTERESTED IN THE BARGE "MLT-3" also known as the "BELL COPPER NO. 3", THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "MERCURY XII", MERCURY LAUNCH & TUG LTD., NEIL PATTERSON and COSULICH GROUP INVESTMENTS INC.

Defendants

REASONS FOR JUDGMENT AND JUDGMENT

[1] It was dark at Brigade Bay. It was cold. The tide was dropping. The front end of the truck was in the water; the rear axle was on the barge. A rope was tied to the rear of the truck and attached

to the tug in a desperate attempt to pull the truck onto the barge. Ed Menczel, the truck driver, went into the water a second time to release the air brakes on the truck so that it could be pulled up. As he did so, the barge swung. The truck toppled into fifty-five feet of water. Ed swam for his life. He reached shore and phoned his boss.

[2] Four and a half years later, the Court is asked to review the events of December 4, 2007. It is asked whether fault can be attributed, and if so, to whom. It is asked to assess damages for loss of the truck and its use. It is asked whether the barge company had agreed to indemnify the truck owner. It is asked whether certain provisions of law such as the Hague-Visby Rules apply, and if so, how.

[3] I thank Counsel for each party for their great assistance in providing agreed facts and documents, and for efficiently presenting their witnesses and argument. Their courtesy to each other and to the Court has been exemplary. This is, I am told, a tradition in the maritime bar, and one that could well be adopted elsewhere.

THE EVIDENCE

[4] The evidence consists of:

- An Agreed Statement of Facts, Exhibit A, which dealt with many, but not all of, the relevant facts of the case;

- Two books of Agreed Documents, Exhibit D, containing 20 tabs of documents addressing issues of liability; and Exhibit E, containing 22 tabs of documents addressing issues of damage. The parties are agreed that the documents are true copies of the originals and, where apparent from the face, made by the person so indicated on the date so indicated, and received by persons so indicated. The truth of the contents is not admitted.

- Mr. Chris Crandlemire, president and owner of the Plaintiff C&C Movers and Warehouse Inc., appeared as a witness for the Plaintiffs;

- Mr. Ed Menczel, the driver of the truck that was lost appeared as the second witness for the Plaintiffs;

- Mr. Robert Errington, president of the Defendant Mercury Launch & Tug Ltd., appeared as a witness on behalf of the Defendants;

- Mr. Neil Paterson, one of the named Defendants, skipper of the tug and barge at issue, appeared as the second witness for the Defendants;

- a number of documents were entered as exhibits to the examination and cross-examination of these witnesses; they were marked as Exhibits F, G, H and K;

- Exhibit I, entered by agreement between the parties, was an expert affidavit and exhibits thereto, of Al German. He provided opinion evidence as to values of the truck that was lost ($34,000), and of the cost to repair and reinstall the crane and deck recovered from the truck onto another truck ($77,248.66);

- Exhibit J contains portions of the transcript of the discovery of the Defendants (through Neil Paterson) entered into evidence by the Plaintiffs

THE ISSUES

[5] The parties are largely agreed as to the issues to be decided, except as to the last issue. Their position as to the issues has been entered as Exhibits B and C and can be set out as follows:

1. *Who is responsible for the loss?*

2. *Were the defendants negligent?*

3. *Were the plaintiffs contributory negligent?*

4. *Is there any in rem claim against the barge or any in personam claim against Cosulich Group Investments Inc.?*

5. *Do the Hague-Visby Rules apply and is the claim time barred?*

6. *(This issue has been dropped by the parties)*

7. *If the Hague-Visby Rules (omitted by agreement) may apply, were any such defences waived by the defendants in conversations before and after the loss between Mr. Errington of Mercury and Mr. Crandlemire of the plaintiff C&C?*

8. *Was C&C's truck present on the Mercury barge as a business invitee, to which Mercury owed a duty of care that is*

> *not subject to any contract or limitation between Mercury and its customer, White?*
>
> *[THE DEFENDANTS say that this last issue, #8, was not pled by the Plaintiffs and is not properly before the Court.]*

THE AGREED FACTS

[6] It is useful to start by setting out the facts which have been agreed by the parties; I have inserted the identity of two documents as referred to with reference to their Trial Exhibit numbers:

> *The Parties*
>
> *1. The plaintiff Wells Fargo Equipment Finance Company ("Wells Fargo") is a company incorporated pursuant to the laws of Nova Scotia. At all material times, Wells Fargo was the registered owner and lessor of a 2001 Freightliner FL80 truck with a flat bed and fitted crane (the "Truck").*
>
> *2. The plaintiff C&C Machine Movers & Warehousing Inc. ("C&C") is a company incorporated pursuant to the laws of British Columbia. At all material times, C&C was the leasee of the Truck.*
>
> *3. The Truck weighed 38,800 lb.*
>
> *4. The defendant Mercury Launch & Tug Ltd. ("Mercury") is a Company incorporated pursuant to the laws of British Columbia;*
>
> *5. The defendant Barge, "MLT'3", previously known as the "Bell Copper No. 3", (the "Barge") is a flat deck barge with official registration no. 345207 registered at the Port of Vancouver, British Columbia, and at all material times was bareboat chartered from the defendant Cosulich Group Investments Inc. ("Cosulich") by Mercury.*
>
> *6. The Barge was owned by Cosulich on Dec 4, 2007 and was sold by it to Mercury on or about January 17, 2008.*

7. The defendant ship "Mercury XII" (the "Tug") is a tug, whose Official Number is 812765, which at all material times was owned by Mercury.

8. The defendant Neil Paterson ("Paterson") was at all material times an employee of Mercury acting in the course of his employment with Mercury as the Captain of the Tug.

Background

9. Prior to December 4, 2007, C&C was requested by Mr. Brian White to provide a truck to move building materials to a building site on Gambler Island.

10. The building materials were loaded on the deck of the Barge prior to the arrival of the Truck at Horseshoe Bay on December 4, 2007.

11. The driver of the Truck was Ed Menczel who at all material times was an employee of C&C and was acting in the course of his employment. Mr. Menczel loaded the Truck onto the Barge by backing it onto the Barge ramp and then onto the Barge. That is the normal way to load a truck onto a barge.

12. On December 4, 2007, the Tug towed the Barge to Brigade Bay on Gambler Island, and Paterson put the Barge ramp down on the concrete ramp on shore and attached shore mooring lines to the Barge. Mr. Menczel used the Truck's crane to load two loads of the building materials to the flat deck of the Truck and then he drove off the ramp on the Barge. Using the Truck, Mr. Menczel delivered the building materials to the building site. He then reloaded the Truck to the Barge by backing it onto the Barge ramp and the reloading occurred without incident.

13. Mr. Menczel then loaded the Truck with the second load of building materials and drove off the ramp on the Barge. After completing the second delivery, Mr. Menczel used the Truck to pick up a pick-up truck belonging to Mr. White and place it on the flat deck before returning to the Barge. Before the Truck returned to the Barge, Paterson had untied the mooring lines from the shore.

14. On December 4, 2007 there was a high tide at Point Atkinson, B.C. near Gambler Island at 13:03 PST (13 feet) and a low tide at 20:29 PST (3.8 feet).

Salvage

15. On December 12, 2007 Mercury salvaged the Truck and placed it on the Barge. Mercury took a photo of the Truck on the Barge during the salvage, which photo also shows the shore ramp in the background [Trial Exhibit D, Tab 1].

White's Contract with Mercury

16. Brian White's contract with Mercury was for use of the Tug and Barge on an hourly basis. Mercury sent an invoice to Brian White for an hourly charge for the Tug and Barge on December 14, 2007 [Trial Exhibit D, Tab 15].

17. Mercury issued no bill of lading, and no bill of lading was intended to be issued.

White's Contract with C&C

18. On December 15, 2007 C&C invoiced Brian White for an hourly charge for use of the Truck [Trial Exhibit D, Tab 16].

C&C, MERCURY AND THEIR RELATIONSHIP

[7] The Plaintiff C&C Machine Movers and Warehousing Inc. (C&C) is a company owned by Chris Crandlemire, which he started in the 1980's under a different name. At the relevant time, C&C owned two large trucks, defined as "straight" or rear axle driven trucks, to distinguish them from a truck and trailer unit, to which were fitted a large wooden deck and a substantial "HIAB" crane. One truck was a Freightliner make, this is, the truck in question; the other was a Peterbilt make. The main business of C&C was to use these trucks to move heavy pieces of equipment and machinery, largely in the Vancouver, British Columbia area. C&C also would also sub-contract some of its business to other truckers and keep a portion of the fee for itself.

[8] The Defendant Mercury Launch & Tug Ltd. (Mercury) is a company, owned by Robert (Rob or Bob) Errington, which has been in business since the mid 1980's. Its principal business includes the provision of a water taxi service and barges for the marine transportation of goods largely in the Howe Sound area near Vancouver. At the relevant time, Mercury had at least two twenty-eight foot aluminium boats fitted with inboard engines which served to function both as water taxis and tugs for hauling barges. Mercury owned or chartered at least three barges; MLT-1, MLT-2 and MLT-3 (then known as BELL COPPER NO. 3 chartered from the Defendant Cosulich) The Bell Copper No. 3 was about 70 feet long and had a wooden deck fitted with a HIAB type crane at the stern, which served not only to lift cargo, but also to lift or lower a wooden ramp about 20 feet long, fitted to the stern of the barge.

[9] In about 2003, Mr. Crandlemire and Mr. Errington developed a business relationship. This relationship developed to the point where each would often refer business to the other, where appropriate. Thus, if somebody wanted cargo moved by water from the mainland Vancouver area to a location in Howe Sound, it would be common that a C&C truck would collect the cargo, be driven onto a Mercury barge, and towed by a Mercury tug to the desired location in Howe Sound where the truck would be driven ashore, offload its cargo, and return to the barge to be carried to the mainland. The usual departure point on the mainland was Horseshoe Bay, at a place referred to as "Stick". In the Howe Sound area there are at least a dozen sites commonly used as landing sites. These sites present a variety of terrain, from flat gravel to rocky slopes.

[10] The relationship between C&C and Mercury prospered in the period from 2003, with mutual benefit. It came to a virtual end after the incident where the truck was lost on December 4, 2007.

BRIGADE BAY

[11] The incident involving the loss of the truck took place at Brigantine Bay, located on Gambier Island, which is in Howe Sound. There appear to be at least two locations in the Bay where boats land. One is for water taxis; the other – the one in question – is used at least in part, for cargo.

[12] The location in question has a rather steep, rocky shoreline. A concrete ramp has been built on shore to facilitate loading and offloading of cargo. At the top of the concrete ramp is a gravelled area where trucks may turn around. Two mooring ropes are provided near the shore ramp to facilitate the securing of barges. At least one mooring rope is secured to an eye-bolt imbedded in rock. Each comprises a wire rope attached to a chain, which is attached to a nylon rope which is the end to be secured to a barge. The nylon rope provides a certain amount of stretch.

[13] Typically, a tug would pull a barge by means of a bridle, which consists of two ropes; one attached to the starboard bow of the barge; the other to the port bow, the other end of which ropes are fixed to a single point at the stern of the tug. The tug/barge unit would enter Brigade Bay whereupon the tug would manoeuver itself in relation to the barge such that the stern of the tug would abut the center of the bow of the barge. The tug would reverse its propeller and drive the barge backward onto, or near, the concrete landing ramp. The barge would be secured by the mooring ropes provided on land, which ropes would be attached one to the starboard stern and the

other to the port stern of the barge. The tug would continue to push the barge toward shore and would maintain its engine on and propeller running throughout the period when the barge remained on or abutting the concrete ramp, often for a period of hours.

LOADING AND OFFLOADING A TRUCK

[14] It is typical when loading a "straight" truck of the type at issue here onto a barge of the type at issue here, to back the truck onto the barge so that it can drive forward off the barge.

[15] Typically, a truck with a load of cargo on its platform would present itself at Horseshoe Bay and be driven backward onto the deck of the barge. Alternatively, the cargo would be loaded directly onto the deck of the barge and then the truck would driven on, backward, onto the deck of the barge.

[16] When the barge arrives at the landing site in Howe Sound, the truck would load the cargo from the barge deck to the truck bed, if the cargo was not already on the bed, and the truck would be driven straight off the barge deck to the barge ramp then to the shore ramp. When the truck returned, it would be backed up onto the barge for the return trip.

[17] The barge is fitted with a ramp on the stern, which ramp, about 20 feet long, is raised and lowered using the crane on the barge. The ramp serves as a transition between the deck of the barge and the shore ramp or shore location, where the truck is to be driven off. The ramp, depending on the tide and location of the shore ramp or area, could be slanted up or down or be relatively straight in relation to the deck of the barge.

EVENTS ON THE DAY IN QUESTION

[18] The day in question is December 4, 2007.

[19] In the morning, the barge Bell Copper No. 3 was docked in Horseshoe Bay with a load of lumber and building materials destined for Mr. White on Gambier Island sitting on its deck. The C&C Freightliner truck driven by Ed Menczel arrived and was loaded onto the deck of the barge, driven backward, at about 10:25 a.m. The tug pulling the barge, driven by Neil Paterson, took off from Horseshoe Bay destined for Brigade Bay on Gambier Island at about 10:30 a.m. This departure time was chosen since the trip took about one and a half hours, and the barge would arrive just before high tide.

[20] The tug and barge arrived at Brigade Bay at about 12:00 noon. The barge was backed into the concrete ramp area; the two mooring lines attached on shore were affixed to either side of the stern of the barge. The tug remained at the bow of the barge with its stern abutting the bow and propeller in reverse, so as to press the barge against the shore. The tug remained in this fashion throughout the rest of the day, subject to the incident to occur later.

[21] A portion of the cargo destined for Mr. White was unloaded from the deck of the barge and loaded onto the deck of the truck. Mr. Menczel drove the truck forward off the barge at about 1:10 p.m. and delivered the cargo to Mr. White’s premises, where it was offloaded.

[22] About 2:40 p.m., the truck returned to the barge, drove backward onto the barge, and was loaded with the remainder of the cargo. About 3:25 p.m., the loaded truck drove off the barge and delivered the remaining cargo to Mr. White's premises.

[23] While at Mr. White's premises, Ed Menczel was asked to load a derelict pick-up truck onto his truck for delivery to a scrap yard on the mainland. Menczel agreed, and the pickup was loaded onto the truck. This may have caused some delay in the return of the truck to the barge, as the truck did not return until about 5:20 p.m. By this time, it was getting dark and the tide was lowering considerably.

[24] At this point, there are differences between the evidence of the truck driver Menczel and the tug skipper Paterson as to what happened. I am satisfied that each is endeavouring as best they can to tell the truth. Given the anxiety created by the events and the time that has since passed, differences in their accounts can be expected. Each of them is a credible witness.

[25] Menczel says that as he approached the gravelled turn-around area at the top of the concrete ramp, a person appeared and made some gestures. This caused him some confusion. Paterson says this person was not him and that he was on the tug or barge and not in a position to see what was happening there.

[26] Both are agreed that at the time the truck was being driven backward onto the barge's loading ramp, both mooring lines were untied. Paterson says that he untied the lines at some time prior to the truck driving down since the tide was going down and the lines were nearly at their end.

Paterson agrees that he could have added more rope to the lines, but this would have taken time and it was getting very dark. The tug was still in reverse, pressing the barge toward shore.

[27] Menczel says that as he was backing the truck onto the barge loading ramp, he could see Paterson directing him in his rear view mirror. Paterson agrees. Menczel says that he then lost sight of Paterson, believing him to have gone to the other side of the truck. Paterson cannot remember.

[28] Menczel says that as the rearmost axle of the truck was just off the barge ramp and on the barge itself, he saw the barge moving. Paterson says the barge did not move at this time.

[29] Sensing, in his belief, that the barge was moving, Menczel applied the air brakes of the truck. These brakes have the effect of locking all wheels of the truck, front and back, until the air brake is released. Menczel says that he believed that this would have the effect of locking the rear wheels to the deck of the barge and the front wheels to the shore ramp; thus preventing further movement of the barge out from the shore.

[30] Mr. Crandlemire, owner of C&C, an experienced truck driver and the person who trained Menczel as a truck driver, said on discovery, and confirmed on cross-examination at trial, that he would have “booted it”; that is, driven the truck rapidly backward onto the deck of the barge, using the rotational force of the rear driving wheels to push the barge toward shore. Paterson, the tug skipper, says that in his experience, this is what many drivers would have done.

[31] It is important to note that I do not have any witness qualified as an expert in driving trucks on or off barges. While I have the views of Menczel, Crandlemire and Paterson; and in the case of Crandlemire, an experienced view, I have no expert opinion.

[32] While Menczel was in the cab of the truck, having applied the air brakes, a noise was heard. This was the front bumper hitting the shore rocks. Soon, the whole front of the truck began to sink, and the cab filled with water. Menczel grabbed his cell phone, jumped out of the cab and swam and waded to the nearest safe place, which was the deck of the barge.

[33] Menczel and Paterson hurriedly discussed what to do. It was decided to attach a rope to the back of the tug and then to the back of the truck in an endeavour to pull the truck onto the deck of the barge. One of the shore mooring lines was quickly attached to the back of the barge. The other proved more difficult. Menczel, with the aid of a flashlight, re-entered the water and swam around until the second mooring line could be located and fixed to the barge.

[34] Paterson determined that the truck could not be pulled onto the deck of the barge with the air brakes on since this caused all wheels to be locked. He persuaded Menczel to swim back into the cab of the truck and release the air brakes. As soon as Menczel had done this, the barge unexpectedly swung so that its starboard side was toward the shore. The truck started to tip. Menczel jumped out and swam for his life, safely reaching shore. By this time, the truck had tipped over and had sunk in fifty-five feet of water.

[35] In the meantime, a water taxi operated by Mercury appeared by chance. Apparently, it had either picked up or dropped off one or more passengers elsewhere on Brigade Bay. The skipper of that boat is now deceased. Both Menczel and Paterson agree that the water taxi in no way caused the accident, nor did it interfere in any way. It did serve to give Menczel a ride back to the mainland where his wife was waiting for him with dry clothes and hot coffee.

[36] Back to the point where Menczel swam to shore. He was given his cell phone, which was on the barge, by Paterson and phoned Crandlemire to tell him what had happened. Crandlemire says that he then called Errington. I will return to these events later.

[37] When Menczel got back to the mainland and was given dry clothes and hot coffee by his wife, they went home. Menczel at that time dictated to his wife the events as he remembered them. These notes are in evidence, Exhibit D, Tab 5. Later, Menczel recounted the events for an insurer, ICBC, and notes of what he said [are also in evidence, Exhibit D, Tab 20].

[38] Paterson made brief notes of the events in his log book, the relevant entries being made the day after. These notes are in evidence, Exhibit D, Tab 13. The notes say:

> *While backing Truck onto Barge driver stops & drives forward forcing barge out from beach. Front end of Truck submerges – back of truck is still on barge ramp. Barge is re-secured to beach and while efforts are being made to recover truck – Barge shifts & rotates – truck topples off ramp & sinks upside down.*

[39] In discovery and in cross-examination, Paterson agreed that he did not see the truck move forward as the note appears to say. Menczel vehemently denies driving the truck forward.

[40] The empty barge and tug returned to Horseshoe Bay about 7:05 p.m.

[41] A few days later, the barge returned to Brigade Bay at the request of C&C and salvaged the truck. A picture of the salvaged truck, with the derelict pickup truck at the Brigantine Bay ramp, is in evidence, Exhibit D, Tab 1. Mercury billed C&C for the salvage operations and C&C paid the bill. Crandlemire says he didn't know who else to turn to and that he always pays his bills.

[42] Paterson is still a skipper for Mercury. Menczel has moved on and now drives a concrete mixer truck. Both appear still to have vivid memories of the evening of December 4, 2007.

DISCUSSIONS BETWEEN CRANDLEMIRE AND ERRINGTON

[43] There are two different discussions that the Plaintiffs allege took place between Mr. Crandlemire and Mr. Errignton that they say are relevant to issues of liability.

[44] The first is a discussion that is said to have taken place between Mr. Crandlemire and Mr. Errington in or about 2003 as the business relationship between their two companies, C&C and Mercury, was developing. Crandlemire says that he was concerned that his trucks would be transported on Mercury's barges and wanted to know what would happen if a truck was lost or damaged. Crandlemire says that Errington said something to the effect that he should not be worried and that Mercury had insurance to cover it. Errington says that he cannot remember any such conversation and that, in any event, he would not have said such a thing to Crandlemire, as Errington's position had always been that people in Crandlemire's position should look after their own insurance.

[45] In any event, Crandlemire subsequently phoned his own insurance broker and, while we do not know what the broker told him, Crandlemire did not take out special insurance.

[46] Considering the evidence, I do believe that Crandlemire did raise the issue of insurance and liability with Errington. However, Crandlemire did not memorialize the discussion in any way, nor did he confirm in writing any of these discussions with Errington. Instead, Crandlemire took the step of contacting his own insurance broker and presumably acted on the advice of the broker. That advice is not in evidence.

[47] I do not view these discussions as constituting any form of indemnification undertaking by Mercury in favour of C&C.

[48] The second set of discussions is that by telephone alleged to have taken place between Crandlemire and Errington the day of the event, December 4, 2007. Crandlemire says that he phoned Errington shortly after Menczel had phoned him to say that the truck had been lost. Crandlemire says that Errington told him something to the effect that he was not to worry and everything would be taken care of. Crandlemire's evidence as to calls being made is backed up by his cell phone records, which show two calls to Mercury's dispatching number, which Errington agrees would have been forwarded to his personal cell phone, around six o'clock in the evening. Crandlemire could not state with accuracy when the calls were made, however, given the passage of time. I do not fault him for this.

[49] Errington denies that these calls were made. I cannot accept this in view of the cell phone records. Errington says, alternatively, that he cannot remember and certainly would not have said words to the effect that he would take care of everything, to Crandlemire.

[50] My assessment of the evidence is that Crandlemire did speak with Errington that evening and that Errington probably said something to calm Crandlemire down. There is no memorialisation of these conversations, and Crandlemire did not confirm anything in writing. In fact, Mercury, a few days later, salvaged the truck and billed C&C $5,215.20 for the service. C&C paid this bill without protest.

[51] I find that, whatever was said in the conversations of December 4, 2007, it did not amount to an undertaking by Mercury to make good the losses suffered by C&C.

[52] I will now turn to the issues.

ISSUE #1: Who is responsible for the loss?

[53] I have already recounted, in some detail, the events surrounding the loss of the truck on December 4, 2007. I find the following are facts that have been proven to my satisfaction and are pertinent to the determination of responsibility for the loss:

1. At all material times, the truck was under the control of the driver, Menczel, and the tug and barge were under the control of the skipper, Paterson. Both were acting within the

scope of their duties. Thus, the actions of Menczel can be attributed to C&C and the actions of Paterson can be attributed to Mercury.

2. At the time when Menczel was backing the truck onto the barge, it was dark and the tide was lowering. The mooring lines provided on shore were not secured to the barge. The barge was held in place only by the backward thrust of the propeller of the tug, which tug was pushing against the bow of the barge.

3. The skipper Paterson was providing hand signal directions to the driver Menczel as the truck was being loaded onto the barge.

4. Menczel perceived the barge to be moving away from shore. On his own accord, he applied the air brakes on the truck, which he hoped would prevent further movement of the barge by locking the rearmost wheels of the truck on the barge and the front wheels of the truck on shore.

5. There is no standard or accepted method to deal with the situation faced by Menczel. It appears that at least some truck drivers would have accelerated the backward driving truck so as to mount the truck onto the barge and, by the backward turning of the wheels, drive the barge toward the shore.

6. Despite Menczel’s efforts in locking the wheels, the barge continued to move away from shore until the front end of the truck fell into the water.

7. Paterson suggested, and Menczel agreed, that a rope should be attached to the tug and the rear of the truck to endeavour to pull the truck onto the barge. To do this, Menczel had to re-enter the cab of the truck and release the air brakes.

8. While Menczel was in the cab, and had released the air brakes, the barge unexpectedly, from unknown causes, turned sideways. Menczel escaped from the truck. The truck fell off the barge and sunk in the water.

[54] I find that the responsibility for the loss of the truck must be borne by Mercury. Mercury owned the tug and was the charterer of the barge. Mercury's skipper, Paterson, directed the loading of the truck onto the barge. When the front of the truck began to enter the water, it was Mercury's skipper who directed that a rope be secured to the tug and truck in an effort to drag the truck onto the barge.

ISSUE #2: Were the Defendants negligent?

[55] I find that Mercury was negligent, first in not securing the mooring lines on shore to the barge. It was dark and the tide was lowering. While there was some element of haste, a prudent skipper would nonetheless have added rope to the lines on shore to secure the barge to the shore. Despite the lack of security, the skipper nonetheless signalled the truck driver to back the truck onto the barge. It was negligent to do so.

ISSUE #3: Were the Plaintiff's contributory negligent?

[56] If fault can be attributed to the Plaintiffs, it was in respect of the driver's choice, upon seeing the barge move, to apply the air brakes in an effort to lock the barge in place. A better alternative seems to have been for the driver to have accelerated the truck in moving backward onto the barge. There is, however, no expert evidence as to what the standard or best practice would have been.

[57] I attribute no fault to the Plaintiffs in respect of the events following, which consist of securing a robe between the tug and truck, followed by the unexplained turning of the barge.

[58] At best, I attribute ten percent (10%) of the fault to the Plaintiff, C&C for applying the air brakes in the first instance.

ISSUE #4: Is there any *in rem* claim against the barge or any *in personam* claim against Cosulich Group Investments Inc.?

[59] It is agreed that, as of the date of the incident, December 4, 2007, the barge then called "Bell Copper No. 3" was owned by Cosulich Group Investments Inc. and operated by Mercury, who chartered the barge from Cosulich. As of the date this action was commenced in 2009, the barge, renamed as "MLT-3", had been sold by Cosulich to Mercury.

[60] It is common ground that section 43(3) of the *Federal Courts Act*, RSC 1985, c. F-7, serves to extinguish the jurisdiction of this Court *in rem* in respect of any claim made under any of subsections 22(2)(e), (f), (g), (h), (i), (k), (m), (n), (p) or (r), of that *Act*, in the circumstances set out above, where ownership of the vessel had changed between the date of the incident and the date that the action was commenced:

43. Marginal note:Exception (3) Despite subsection (2), the jurisdiction conferred on the Federal Court by section 22 shall not be exercised in rem with respect to a claim mentioned in paragraph 22(2)(e), (f), (g), (h), (i), (k), (m), (n), (p) or (r) unless, at the time of the commencement of the action, the ship, aircraft or other property that is the subject of the action is beneficially owned by the person who was the beneficial owner at the time when the cause of action arose.	*43. Note marginale :Exception (3) Malgré le paragraphe (2), elle ne peut exercer la compétence en matière réelle prévue à l'article 22, dans le cas des demandes visées aux alinéas 22(2) e), f), g), h), i), k), m), n), p) ou r), que si, au moment où l'action est intentée, le véritable propriétaire du navire, de l'aéronef ou des autres biens en cause est le même qu'au moment du fait générateur.*

[61] Plaintiff's Counsel argues that a claim under section 22(2)(d) *in rem* is not extinguished and that Cosulich, as the owner of the barge at the time of the incident, had immediate personal liability for the *in rem* claim against the barge. Subsection 22(2)(d) of the *Federal Courts Act* reads:

22(2) Without limiting the generality of subsection (1), for greater certainty, the Federal Court has jurisdiction with respect to all of the following:	*22(2) Il demeure entendu que, sans préjudice de la portée générale du paragraphe (1), elle a compétence dans les cas suivants :*
. . .	. . .
(d) any claim for damage or for loss of life or personal injury caused by a ship either in collision or otherwise;	*d) une demande d'indemnisation pour décès, dommages corporels ou matériels causés par un navire, notamment par collision;*

[62] Plaintiff's Counsel cites *MacMillan Bloedel Ltd v Canadian Stevedoring* Co, [1969] 2 Ex CR 375 at paragraph 33 as an example of an action respecting damage caused by a ship:

> *33 In my opinion, there is no doubt that the claim as framed in this case is for damage "done by a ship" by "striking" the wharf and by "throwing lumber off her decks onto the wharf" and that it comes within the most restrictive of the various statements that have been made as to the effect of section 7 of the 1861 Act when those statements are considered in their context. The function of a freight vessel is to receive goods, carry them and discharge them. During all of the time that it is performing such functions, a ship is afloat in water and must be so managed and controlled as to make possible the achievement of her function. It is just as important so to manage a vessel when she is discharging or receiving goods that she will remain stable and not roll over as it is so to manage her when she is moving from one point to another that she will safely reach her destination. If as a result of a failure of those in charge of discharging or loading a vessel, the vessel breaks from her moorings and strikes [page387] the wharf or otherwise does damage, the damage is, in my view, "done by a ship" in exactly the same sense as is damage done by a ship in collision. In my view there could be no question that an action in this case against the ship itself or its operating owner would clearly fall within section 22(1)(b) of the 1925 statute.*

[63] In *MacMillan Bloedel*, the ship struck a wharf and caused some of its cargo to be thrown onto the wharf. This was held to be damage "done by a ship".

[64] Plaintiff's Counsel also cites the House of Lords decision in *The Eschersheim*, 1 [1976] WLR 430 for the proposition that physical contact by a ship is unnecessary in order to have a claim for "damage done by a ship". However, the whole of the passage of Lord Diplock's reasons, with which all of the other Law Lords agreed, at page 438, must be considered:

> *The figurative phrase "damage done by a ship" is a term of art in maritime law whose meaning is well settled by authority. (The Vera Cruz (No. 2) (1884) 9 P.D. 96; Currie v. McKnight [1897] A.C. 97.) To fall within the phrase not only must the damage be the direct result or natural consequence of something done by those engaged in the navigation of the ship but the ship itself must be the actual instrument by which the damage was done. The commonest case is that of collision, which is specifically mentioned in the Convention: but physical contact between the ship and whatever object sustains the damage is not essential – a ship may negligently cause a wash by which some other vessel or some property on shore is damaged.*

[65] Thus, it can be seen that the phrase "damage caused by a ship" is a term of art in maritime law. The damage must be a direct result or natural consequence of something done by those engaged in the navigation of the ship *but the ship itself must be the actual instrument by which the damage was done*.

[66] In the present circumstances, neither the barge "Bell Copper No. 3" nor the tug "Mercury XII" were the actual instruments (whether by physical contact or otherwise) of the damage done to the truck. The damage was done by the actions of one or the other or both of the truck driver and skipper of the barge and tug.

[67] I therefore find that, in the circumstances of this case, no action *in rem* lies against the barge MLT-3, previously called Bell Copper No. 3. Since no *in rem* claim lies, no *in personam* claim lies against the Defendant Cosulich Group Investments Inc.

ISSUE #5: Do the *Hague-Visby Rules* apply, and is the claim time barred?

[68] The *Hague-Visby Rules* are a set of rules that have been set out in Schedule 3 of the *Marine Liability Act*, SC 2001, c. 6. Section 41 of that *Act* defines those *Rules* as follows:

41. The definitions in this section apply in this Part.	*41. Les définitions qui suivent s'appliquent à la présente partie.*
"Hague-Visby Rules"	. . .
« règles de La Haye-Visby »	*« règles de La Haye-Visby »*
"Hague-Visby Rules" means the rules set out in Schedule 3 and embodied in the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, concluded at Brussels on August 25, 1924, in the Protocol concluded at Brussels on February 23, 1968, and in the additional Protocol concluded at Brussels on December 21, 1979.	*"Hague-Visby Rules"* *« règles de La Haye-Visby »* *Les règles figurant à l'annexe 3 et faisant partie de la Convention internationale pour l'unification de certaines règles en matière de connaissement, conclue à Bruxelles le 25 août 1924, du protocole de Bruxelles conclu le 23 février 1968 et du protocole supplémentaire de Bruxelles conclu le 21 décembre 1979.*

[69] The *Hague-Visby Rules* have been given the force of law in Canada in the following manner by subsections 43(1) and (2) of the *Marine Liability Act*:

43. (1) The Hague-Visby Rules have the force of law in Canada in respect of contracts for the carriage of goods by water between different states as described in Article X of those Rules.	*43. (1) Les règles de La Haye-Visby ont force de loi au Canada à l'égard des contrats de transport de marchandises par eau conclus entre les différents États selon les règles d'application visées à l'article X de ces règles.*
Marginal note: Extended application *(2) The Hague-Visby Rules also apply in respect of contracts for the carriage of goods by water from one place in Canada to another place in Canada, either*	*Note marginale :Application étendue* *(2) Les règles de La Haye-Visby s'appliquent également aux contrats de transport de marchandises par eau d'un lieu*

directly or by way of a place outside Canada, unless there is no bill of lading and the contract stipulates that those Rules do not apply.	*au Canada à un autre lieu au Canada, directement ou en passant par un lieu situé à l'extérieur du Canada, à moins qu'ils ne soient pas assortis d'un connaissement et qu'ils stipulent que les règles ne s'appliquent pas.*

[70] It is important to note that subsection 43(1) of the *Marine Liability Act* makes the *Hague-Visby Rules* applicable "…in respect of carriage for the carriage of goods by water between different states as described in Article X of those *Rules*". Article X says:

Article X *Application* *The provisions of these Rules shall apply to every bill of lading relating to the carriage of goods between ports in two different States if:* *(a) the bill of lading is issued in a Contracting State, or* *(b) the carriage is from a port in a Contracting State, or* *(c) the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract,* *whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.*	*Article X* *Application* *Les dispositions des présentes règles s'appliqueront à tout connaissement relatif à un transport de marchandises entre ports relevant de deux États différents, quand :* *a) le connaissement est émis dans un État contractant, ou* *b) le transport a lieu au départ d'un port d'un État contractant, ou* *c) le connaissement prévoit que les dispositions des présentes règles ou de toute autre législation les appliquant ou leur donnant effet régiront le contrat,* *quelle que soit la nationalité du navire, du transporteur, du chargeur, du destinataire ou de toute autre personne intéressée.*

[71] Subsection 43(2) of the *Maritime Liability Act* follows from subsection 43(1) to extend the application of the *Hague-Visby Rules* respecting "contracts for the carriage of goods" to those dealing with delivery of goods from one place in Canada to another place in Canada unless there is no bill of lading and the contract stipulates that the *Rules* do not apply.

[72] Subsections 43(1) and (2) must be read together such that, in each instance, the "contract for the carriage of goods" must be that as defined in Article X of the *Hague-Visby Rules*. Article X makes the *Rules* applicable to a "bill of lading" and the "contract contained in or evidenced by the bill of lading".

[73] A "bill of lading" is not defined in the *Marine Liability Act*, nor in the *Hague-Visby Rules*; however, Article I of the *Rules* defines a "contract of carriage" as a contract covered by a "bill of lading" or similar document of title".

Article I *Definitions* *In these Rules the following expressions have the meanings hereby assigned to them respectively, that is to say,*	*Article I* *Définitions* *Dans les présentes règles, les mots suivants sont employés dans le sens précis indiqué ci-dessous :*
. . .	. . .
(b) "contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by water, including any bill of lading or any similar document as	*b) « contrat de transport » s'applique uniquement au contrat de transport constaté par un connaissement ou par tout document similaire formant titre pour le transport des marchandises par eau, il s'applique également au connaissement ou document*

aforesaid issued under or pursuant to a charter-party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same;	*similaire émis en vertu d'une charte-partie à partir du moment où ce titre régit les rapports du transporteur et du porteur du connaissement;*

[74] Justice Harrington of this Court had considered what constitutes a "bill of lading" in *Timberwest Forest Corp v Pacific Link Ocean Services Corp*, 2008 FC 801 at paragraphs 13 and 14:

> *13 Although the bill of lading is a venerable document, it is not defined in either the Hague-Visby Rules or in our Bills of Lading Act. Article I of the Rules provides that they only apply to "...contracts of carriage covered by a bill of lading or similar document of title." Depending on its terms, a bill of lading may, or may not, be a negotiable instrument. A fundamental aspect of a contract of carriage covered by a bill of lading is that the carrier, or its agents, delivers the cargo to the holder of the bill. These attributes of a bill of lading are not relevant to this case.*
>
> *14 An on board bill of lading serves as a receipt for the goods and represents that they are in fact on board. It should also reflect their apparent order and condition. The bill of lading is invariably issued after shipment, and after the contract of carriage was made. Therefore, in the hands of the party who entered into the contract of carriage with the carrier, it may or may not evidence the terms and conditions of carriage. In this case, the bill of lading only forms part of the overall contract. Had the bill been consigned or endorsed to someone else, then in virtue of section 2 of the Bills of Lading Act, that person would have been "...vested with all rights of action and is subject to all liabilities in respect of those goods as if the contract contained in the bill of lading had been made with himself." In such a case, the bill of lading would be the contract. There is no third party consignee or endorsee, and so the bill of lading, which was never issued, would not really have served as a document of title. Nevertheless, these variables are relevant in considering whether the overall contract of carriage called upon the shipper to take out insurance for the carrier's benefit, and, if so, whether that*

> *requirement runs contrary to the Rules. Certainly, there is no such requirement in the carrier's standard bill of lading form, but there may be in another part of the overall contract.*

[75] Justice Dubé of this Court in *Canadian General Electric Company Limited v Les Armateurs du St-Laurent Inc*, [1977] 1 FC 215, dealt with previous maritime legislation; however, he did conduct a comprehensive review of jurisprudence respecting bills of lading. I repeat what he wrote at page 222:

> *Lord Goddard is quoted further down the page from his decision in "the Ardennes" case:*
>
> *It is, I think, well settled that a bill of lading is not in itself the contract between the shipowner and the shipper of goods, though it has been said to be excellent evidence of its terms: Sewell v. Burdick, per Lord Bramwell and Crooks v. Allan. The contract has come into existence before the bill of lading is signed; the latter is signed by one party only, and handed by him to the shipper usually after the goods have been put on board. No doubt if the shipper finds that the bill contains terms with which he is not content, or does not contain some term for which he has stipulated, he might, if there were time, demand his goods back; but he is not, in my opinion, for that reason, prevented from giving evidence that there was in fact a contract entered into before the bill of lading was signed different from that which is found in the bill of lading or containing some additional term. He is no party to the preparation of the bill of lading; nor does he sign it.*

and at page 223:

> *The three functions of a bill of lading are outlined by Bes, J., in Chartering and Shipping Terms, vol. 1, 9th ed., Barker & Howard Ltd., London, 1975 at page 110:*
>
> *A bill of Lading has the following functions:*
>
> 1. *It is a receipt for goods, signed by the master or other duly authorized person on behalf of the carriers.*

2. *It is a document of title to the goods described therein.*

3. *It serves as evidence of the terms and conditions of carriage agreed upon between the two parties*

[76] Thus, I find, that the "contracts for carriage of goods" in respect of which subsection 43(2) of the *Marine Liability Act* makes the *Hague-Visby Rules* applicable, is a contract which is incorporated into or evidenced by a bill of lading or a similar document of title. If there is no bill of lading or similar document, then subsection 43(2) does not make the *Hague-Visby Rules* applicable to carriage of goods from one place in Canada to another place in Canada. In short, there must be a document; oral contracts not evidenced by or incorporated into a bill of lading or similar document are not caught by subsection 43(2) of the *Marine Liability Act*.

[77] Article III, paragraph 6, of the *Hague-Visby Rules* precludes an action against a carrier and the ship that is not brought within one year of the delivery date:

> *Subject to paragraph 6bis the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period may, however, be extended if the parties so agree after the cause of action has arisen.*

[78] In the present case, the action was commenced more than one year from the date of delivery of the goods. However, there was no written contract between the Plaintiff and Mercury, or any document evidencing a contract. The contract between Mr. White and Mercury was for use of the tug and barge on an hourly basis. It is agreed that Mercury issued no bill of lading and none was intended to be issued.

[79] The *Hague-Visby Rules* do not apply. The action is not time barred by those *Rules*.

ISSUE #6: (This issue has been dropped by the parties)

ISSUE #7: If the Hague-Visby Rules may apply, were any of the defences waived in conversations before and after the loss between Mr. Errington of Mercury and Mr. Crandlemire of the Plaintiff C&C?

[80] I have already held, in dealing with ISSUE #4, that the *Hague-Visby Rules* do not apply.

[81] Even if they did apply, I am not satisfied that the evidence establishes the nature and extent of those conversations to a degree that I could find that they did establish an understanding between the parties.

[82] With respect to the conversations between Mr. Errington and Mr. Crandlemire in 2003, there is no written record or other preserved evidence as to what exactly was said and by whom. Mr. Crandlemire did have subsequent discussions with his insurance agent; therefore, whatever Mr. Errington may have said did not cause Mr. Crandlemire or C&C to rely on Errington's statements or to change their position with respect to what Errington may have said. At best, what Errington may have said simply prompted Crandlemire to make his own enquiries as to insurance and to take steps, or refrain from taking steps, after he talked to his own insurance broker.

[83] With respect to the conversation between Mr. Errington and Mr. Crandlemire on or about December 4, 2007, again, I find insufficient evidence as to the exact nature of those conversations and what was said. I find that conversations did take place, but cannot find exactly what was said.

Mr. Crandlemire did not take or refrain from taking any action as a result of those conversations. Thus, there was no detrimental reliance. To the extent that Mr. Errington made an offer of assistance, if any, it was quickly repudiated. In fact, C&C paid Mercury for salvage of the truck without protest at the time.

[84] Thus, I find that even if the *Hague-Visby Rules* did apply, there was no waiver.

ISSUE #8: Was C&C's truck present on the Mercury barge as a business invitee, to which Mercury owed a duty of care that is not subject to any contract or limitation between Mercury and its customer, White?

[85] Defendants' Counsel argues that this issue was not pleaded. Plaintiffs' Counsel agrees that the issue was not explicitly pleaded, but argues that it is an issue of law clearly arising from what is pleaded and what was clearly known to the Defendants through a number of pre-trial hearings and motions.

[86] I agree with Defendants' Counsel that this issue is not properly before this Court for determination. This action has been underway for some three years; the pleadings of both parties have been amended through the course of a series of case management hearings and motions. There was ample opportunity to put forward an amendment to the claim if so advised.

[87] To argue that the matter is simply an argument of law applicable to known facts misses the point. An argument of law based on facts, known or otherwise, must be directed to an issue. An issue must be pleaded. An opposite party must not be left to guess what may be put forward and

argued at trial. The party must be clearly apprised as to the issue to be met. I repeat what I wrote at paragraph 73 of my decision in *Apotex Inc v AstraZeneca Canada Inc*, 2012 FC 559:

> *[73] I have reviewed AstraZeneca's written arguments and heard its Counsel in oral argument. Some of that argument goes beyond what AstraZeneca pleaded. AstraZeneca urges that it is not required to plead law, and that its arguments are directed to the law; thus, do not need to be constrained by the pleadings. I do not subscribe to this argument. Rules 173 to 181 of this Court, which are similar to such rules as found in other Courts in this country, stipulate what pleadings shall contain. They shall contain a concise statement of the material facts, they may raise a point of law, and they shall contain sufficient particulars. Pleadings define the issues. Facts provide the framework for those issues. Law is argued in support of or against those issues when it comes to a trial or hearing. There is no unrestrained permission to present an argument simply because it is based only on law. The argument must relate to a pleaded issue.*

[88] Therefore, I do not consider that ISSUE #8 is properly before the Court, and I will not determine that issue.

QUANTIFICATION OF DAMAGES

[89] As to numerical quantification of damages (as opposed to liability for those damages) Counsel for the parties are agreed as to the following:

Total ICBC Repairs and Salvage (GST Removed)	$114,844.66
Deductible	300.00
Total	$115,144.66

[90] Counsel for the Defendants does not agree with Plaintiffs' claim respecting a series of invoices submitted by Falcon Equipment for items of addition and repair not covered by ICBC (the insurer). They total $39,844.86. Defendants' Counsel agreed that from this figure should be deducted a proportionate labour charge of $1,807.29. This would reduce this portion of the claim to $38,037.57. I find that these expenses were reasonably incurred so as to put the Plaintiff C&C in the position that it would have been had the truck not been lost. I will add the sum of $38,037.57 to the Plaintiffs' claim.

[91] The Plaintiffs also claim a sum of $44,185.81 for lost profit for a period of 4.3 months, which is the period between December 4, 2007 and the time that a new truck, fitted with the rebuilt deck and crane, was put into service. The evidence shows that during this period, C&C subcontracted the work that it had undertaken to do, to other truckers. C&C would invoice the customers and make payment to the subcontractor, keeping a portion for itself. The evidence shows that during this period, C&C sufficiently mitigated its damages in this regard and that no award for loss of use will be made.

[92] In sum, therefore, the total claim properly asserted by the Plaintiffs is the agreed amount of $115,144.66, plus the amount paid to Falcon of $38, 037.57, which results in a total of $153,182.23.

[93] Given that I have attributed ten percent (10%) of the fault to the Plaintiff C&C, I find that the Defendant Mercury in its personal capacity and as owner of the tug Mercury XII, together with the Defendant Paterson, who was acting within the scope of his duties with Mercury, are liable for ninety percent (90%) of the sum of $153,182.23, which is the sum of $137,864.00.

[94] I am told that “Admiralty Interest” is to apply to this claim, but that such interest is simply prevailing bank lending rates. Such interest will apply at prevailing bank interest rates, compounded semi-annually since December 4, 2007.

COSTS

[95] Both Counsel have asked that I reserve as to costs. Therefore, each of the Plaintiffs and Defendants may address costs by a simultaneous exchange of submissions not to exceed five (5) pages, within fourteen (14) days of release of the Judgement herein; with a right to file reply submissions not exceeding three (3) pages within seven (7) days thereafter. Costs will be determined after receipt of all submissions.

JUDGMENT

FOR THE REASONS PROVIDED herein:

THIS COURT ADJUDGES that:

1. The claim is dismissed as against the Defendant Cosulich Group Investments Inc.;

2. The *in rem* claim against the Barge "MLT-3", also known as "Bell Copper No. 3" is dismissed;

3. The remaining Defendants, jointly and severally, are liable in damages to the Plaintiffs to pay the sum of $137,864.00, together with interest at prevailing bank rates, compounded semi-annually, since December 4, 2007; and

4. The parties shall speak to costs in the manner set out in the Reasons.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2018-09
STYLE OF CAUSE:	WELLS FARGO EQUIPMENT FINANCE COMPANY AND C&C MACHINE MOVERS AND WAREHOUSING INC. v THE OWNERS AND ALL OTHERS INTERESTED IN THE BARGE "MLT-3", ET AL
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	May 29 & 30, 2012; June 1, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	HUGHES J.
DATED:	June 12, 2012

APPEARANCES:

Douglas G. Schmitt	FOR THE PLAINTIFFS
John W. Bromley	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

Alexander Holburn Beaudin & Lang LLP Barristers & Solicitors Vancouver, British Columbia	FOR THE APPLICANTS
Bull, Housser & Tupper LLP Barristers & Solicitors Vancouver, British Columbia	FOR THE DEFENDANTS