Federal Court of Appeal  Cour d'appel fédérale

Date: 20151209

Docket: A-50-15

Citation: 2015 FCA 282

CORAM: **NADON J.A.**
SCOTT J.A.
RENNIE J.A.

BETWEEN:

LEO OCEAN S.A.

Appellant

and

WESTSHORE TERMINALS LIMITED PARTNERSHIP by its General Partner WESTSHORE TERMINALS LTD., WESTSHORE TERMINALS INVESTMENT CORPORATION, WESTAR MANAGEMENT LTD., and VANCOUVER FRASER PORT AUTHORITY

Respondents

Heard at Vancouver, British Columbia, on November 17, 2015.

Judgment delivered at Vancouver, British Columbia, on December 9, 2015.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: SCOTT J.A.
RENNIE J.A.

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REASONS FOR JUDGMENT

NADON J.A.

I. Introduction and Essential Facts

[1] On December 7, 2012 the vessel *Cape Apricot*, owned by the appellant, Leo Ocean S.A. ("Leo") collided with and destroyed approximately 450 feet of the trestle carrying the conveyor

system, roadway, electrical power and water to berth number 1 at the Westshore terminals in the Port of Vancouver.

[2] At all material times herein, the Westshore terminals were operated by Westshore Terminals Limited Partnership ("Westshore") pursuant to a modified lease dated January 1, 2012 (the "lease") whereby the owner of the property on which the Westshore terminals were constructed, the respondent Vancouver Fraser Port Authority ("Port Authority"), leased certain lands and water lot areas totalling some 972,799 square metres, more or less, to Westshore for the period, including renewals, ending in 2051.

[3] As a result of the events which occurred on December 7, 2012, Westshore filed a statement of claim in the Federal Court seeking to recover special and general damages plus interest and costs against Leo and a number of Leo's ships including the *Cape Apricot*.

[4] Westshore's proceedings led Leo to commence, on April 9, 2013, limitation proceedings pursuant to the C*onvention on Limitation of Liability for Maritime Claims, 1976* as incorporated by reference in subsection 26(1) of the *Marine Liability Act, S.C. 2001, c.6***.**

[5] In the context of Leo's limitation proceedings, the Federal Court made an order on September 17, 2013 that all claims against the limitation fund to be established by Leo were to be filed no later than November 8, 2013. Amongst the claimants who filed claims pursuant to the Federal Court's order were Westshore and the Port Authority.

[6] The Port Authority filed its claim on November 5, 2013 seeking recovery of an amount of approximately $1,027,166.00 which represents the loss of "Participation Rent" as provided for in the lease. As for Westshore, it also filed its claim within the prescribed date claiming a sum of $49,685,584.43.

[7] On June 9, 2014 Westshore brought a motion seeking judgment after a summary trial pursuant to Rules 213 and 216 of the *Federal Courts Rules*, S.O.R./98-106. By its motion, Westshore sought the dismissal of the Port Authority's claim on the basis that it was a claim for pure economic loss and hence not recoverable. Leo joined in to support Westshore on its motion before the Federal Court.

[8] The matter proceeded before Madam Justice Heneghan (the "Judge") who, on February 2, 2015, dismissed Westshore's motion with costs in favour of the Port Authority. The Judge was of the view that the matter before her was not suitable for determination by way of a summary trial. This is the judgment (2015 FC 130) which is now under appeal before us.

[9] Before addressing the issues raised by the appeal, I should point out that at the hearing of the appeal we were advised by counsel for Leo that Westshore's claim had been settled and that, as a result, Westshore was no longer a party to these proceedings.

[10] For the reasons that follow, I conclude that Leo's appeal ought to be allowed.

II. Legislation

[11] For the purpose of this appeal, Rules 213(1) and 216(5) and (6) of the *Federal Courts Rules* are relevant. They read as follows:

213. (1) A party may bring a motion for summary judgment or summary trial on all or some of the issues raised in the pleadings at any time after the defendant has filed a defence but before the time and place for trial have been fixed.	**213**. (1) Une partie peut présenter une requête en jugement sommaire ou en procès sommaire à l'égard de toutes ou d'une partie des questions que soulèvent les actes de procédure. Le cas échéant, elle la présente après le dépôt de la défense du défendeur et avant que les heure, date et lieu de l'instruction soient fixés.
216. (5) The Court shall dismiss the motion if	**216**. (5) La Cour rejete la requête si, selon le cas :
(*a*) the issues raised are not suitable for summary trial; or	*a*) les questions soulevées ne se prêtent pas à la tenue d'un procès sommaire;
(*b*) a summary trial would not assist in the efficient resolution of the action.	*b*) un procès sommaire n'est pas susceptible de contribuer efficacement au règlement de l'action.
(6) If the Court is satisfied that there is sufficient evidence for adjudication, regardless of the amounts involved, the complexities of the issues and the existence of conflicting evidence, the Court may grant judgment either generally or on an issue, unless the Court is of the opinion that it would be unjust to decide the issues on the motion.	(6) Si la Cour est convaincue de la suffisance de la preuve pour trancher l'affaire, indépendamment des sommes en cause, de la complexité des questions en litige et de l'existence d'une preuve contradictoire, elle peut rendre un jugement sur l'ensemble des questions ou sur une question en particulier à moins qu'elle ne soit d'avis qu'il serait injuste de trancher les questions en litige dans le cadre de la requête.

III. The Federal Court Decision

A. *Parties' Submissions Before the Judge*

[12] Before the Judge, Westshore and Leo argued that as the Port Authority did not own or lease the trestle on December 7, 2012, its claim was barred by the exclusionary rule in respect of pure economic loss. Hence, the Port Authority's claim should be struck.

[13] For its part, the Port Authority argued that its claim was not barred by the economic loss rule. First, it said that it had sustained actual, physical damage to the property leased to Westshore and that consequently, it was incorrect to assert that it had only sustained economic loss. Second, it said that even if it had sustained economic loss only, it was still entitled to recover its loss. More particularly, the Port Authority argued that as it had a proprietary or possessory interest, including a future possessory interest, in the property damaged by the *Cape Apricot*, its claim fell within one of the exceptions to the exclusionary rule in respect of pure economic loss. Consequently, the Port Authority sought a judgment dismissing Westshore's motion with costs to be paid forthwith.

[14] It is important to point out that neither Westshore nor Leo, or the Port Authority, took the position before the Judge that the matter at issue was not appropriate for a determination by way of summary trial. More particularly, the parties did not make any submissions to the effect that additional evidence or further material was required to dispose of the issue raised by Westshore's motion. Of relevance is the fact that the Port Authority argued before the Judge that it was entitled, on the merits, to a determination that its claim was not barred by the economic loss rule.

B. *The Decision*

[15] I now turn to the reasons given by the Judge for refusing to dispose of the matter before her by way of summary trial.

[16] After reviewing the relevant facts, the Judge turned to the lease entered into between Westshore and the Port Authority on April 30, 1969 and subsequently renewed with a term expiring on December 31, 2051. She began by pointing out that Westshore, as the tenant under the lease, could build fixtures described in the lease as "Tenant Improvements", which, upon expiry of the lease, the Port Authority had the option of purchasing. She also pointed out that the trestle at berth number 1 of the Westshore Terminals constituted an improvement by Westshore as tenant.

[17] The Judge then turned to an examination of certain provisions of the lease. First of all, she turned to those provisions of the lease which defined some of the basic concepts found in the lease, namely the "Basic Rent", the "Additional Rent" and the "Participation Rent". She explained that pursuant to Section V of Schedule "A" of the lease, "Participation Rent" was calculated on the minimum annual tonnage of the goods shipped annually through the Westshore Terminals. In the case of *force majeure*, the minimum annual tonnage had to be proportionately adjusted to reflect the *force majeure* period, i.e. those days during which Westshore was unable to ship goods to or through its terminal.

[18] After noting that pursuant to clause 9.1(4) of the lease, Westshore was bound to pay rent to the Port Authority notwithstanding the occurrence of damage to the leased premises or to the

tenant improvements, the Judge turned to clause 19.5 of the lease which provides that all of the improvements made by Westshore are to be vested in the Port Authority at the end of the lease unless it exercises its option to have them removed at Westshore's cost and expense.

[19] The Judge also took note of clause 15 of the lease which provides that Westshore must obtain, maintain and pay for, during the term of the lease, insurance or insurance policies, as listed in Schedule "B" of the lease against all risks specified in Schedule "B".

[20] The Judge then pointed out that by reason of the damage caused to the trestle on December 7, 2012, the Westshore terminals were out of commission until February 7, 2013 when repairs thereto were completed. Finally, she pointed out that the collision had resulted in the deposit of coal and coal remnants on the seabed. She then turned to the parties' submissions which I have already set out, albeit in brief, above.

[21] She began her analysis by saying that the purpose of Westshore's motion was to prevent the Port Authority from claiming a share of the limitation fund that might be established by Leo, noting that the Port Authority's claim was for Participation Rent only.

[22] She then referred to, at paragraph 28 of her reasons, the decision of Hughes J. in *Teva Canada Ltd. v. Wyeth LLC*, 99 C.P.R. 4th 398, 2011 FC 1169 ("*Teva*") where the learned judge indicated when, in his opinion, summary trial was appropriate. He wrote as follows:

> 34. In the present case, I find that a summary trial and summary judgment is an appropriate way to proceed so as to secure a just, expeditious and least expensive determination of the issues before the Court. I do so for the following reasons:

a. the issues are well defined and , while a disposition of the issues may not resolve every issue in the action, they are significant issues and their resolution will allow the action or whatever remains, to proceed more quickly or be resolved between the parties acting in good faith;

b. the facts necessary to resolve the issues are clearly set out in the evidence;

c. the evidence is not controversial and there are no issues as to credibility; and

d. the questions of law, though novel, can be dealt with as easily now as they would otherwise have been after a full trial.

[23] The Judge then referred to paragraph 35 of Hughes J.'s decision in *Teva*, *supra* where he said that the burden of showing that it was appropriate, in a given case, to proceed by way of a summary trial was that of the party seeking to obtain a determination by way of a summary trial. Thus, in the Judge's opinion, that burden in the present matter fell to Westshore and Leo.

[24] The Judge then addressed the arguments put forward by the parties in support of their arguments on the question to be determined, i.e. whether the Port Authority's claim should be struck.

[25] She first addressed arguments made by Leo with regard to the application of insurance law to the motion before her. In her view, the authorities referred to by Leo were not relevant to the main question raised by Westshore's motion which, in her opinion, was whether it could be shown that the Port Authority had a right to recover contractual economic loss.

[26] She then addressed arguments put forward by Westshore that the Port Authority's claim for economic loss should be dismissed. First, she stated that she was not convinced by

Westshore's arguments that the Port Authority did not have a proprietary or possessory interest under the lease. This led her to refer to clause 19.5 of the lease and to say that on the basis of that clause, she was satisfied that the Port Authority had an arguable case regarding the existence of a proprietary or possessory interest in the improvements made by Westshore, including the trestle which had been damaged by the *Cape Apricot*. She added that although the Port Authority could not exercise its rights resulting from a possible proprietary or possessory interest until such time as the lease expired, this did not lead to the conclusion that the Port Authority did not have an arguable case.

[27] These remarks by the Judge led her to review the jurisprudence pertaining to the recovery of an economic loss. In particular, the Judge paid attention to the Supreme Court of Canada's decisions in *Canada National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, [1992] S.C.J. No. 40 (*Norsk), Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, [1997] S.C.J. No. 111 and *D'Amato v. Badger*, [1996] 2 S.C.R. 1071, [1996] S.C.J. No. 84 where the Supreme Court held that, as a general rule, there was a bar against recovery for economic loss and that certain exceptions to the rule had been recognized to date, namely cases where a claimant had a possessory or proprietary interest in the damaged property, maritime general average cases and where the relationship between the claimant and the damaged property constituted a joint or common venture. The Judge also examined the House of Lords' decision in *Anns v. Merton London Borough Council*, 1977 2 All E.R. 492 (U.K. H.L.), where the House of Lords opined with respect to the issues of proximity and the duty of care and whether, notwithstanding that proximity between the parties had been established, there were policy considerations negating the imposition of a duty of care.

[28] The Judge's examination of these cases led her to conclude as follows at paragraph 51 of her reasons:

> [51] In summary, the jurisprudence shows that recovery for contractual relational economic loss is presumptively excluded, subject to the three recognized categories as discussed in *Norsk*, *supra* and any new categories that may emerge as the common law develops; see the decision in *Martel*, *supra* at paragraphs 41-42.

[29] Turning to the facts before her, the Judge indicated that the Port Authority's claim arose in the context of a lease between the Port Authority and Westshore and in the further context that the *Cape Apricot* had caused damage to the marine terminal facilities under the control of Westshore.

[30] This led the Judge to say, at paragraph 54 of her reasons, that the lease gave "rise to a genuine issue that the Port Authority holds a proprietary or contingent possessory interest in the property that was damaged by Leo Ocean" and that "[t]he scope of that interest depends upon construction of all relevant terms of the contract, including the many clauses in the Lease that address rent".

[31] At paragraph 56 of her reasons the Judge indicated that on the basis of the evidence before her, there could be no doubt that there was a dispute with respect to whether or not the Port Authority had a proprietary or possessory interest in the leased premises, adding that the existence of such an interest depended on a construction of the lease.

[32] Then, at paragraph 57 of her reasons, the Judge stated that because there was a dispute between the parties as to whether or not the Port Authority had a proprietary or possessory

interest in the leased premises, the motion for summary trial could not succeed as it did not meet the first part of the test set out by Hughes J. in *Teva supra*. The Judge's rationale for her conclusion that Westshore and Leo could not succeed on the motion for a summary trial appears clearly from paragraphs 58 to 61 of her reasons which I now reproduce:

> [58] The issue arising in this motion, while not involving any question of credibility, is complicated and should be determined on a full record, not on the basis of a summary trial. I note that even Westshore, in its initial reply memorandum filed on July 15, 2014, acknowledges that if the Port Authority has a possessory interest in the damaged property which gave rise to its claimed loss, there may have been a possible exception to the rule precluding recovery of pure economic loss.
>
> [59] The Port Authority's recovery of its claim for contractual relational economic loss depends upon the ability to prove that it is owed a duty of care by Leo Ocean, the tortfeasor.
>
> [60] A finding in this regard will require interpretation of the terms of the Lease in order to determine whether the Port Authority holds a proprietary or possessory interest
>
> [61] The issue will then turn on the extent of the proprietary or possessory interest, and whether that interest is sufficient to justify a duty of care upon Leo Ocean, and that such duty of care is not negated by policy considerations.

[33] In the above paragraphs, the Judge makes it clear that there are no questions of credibility which must be determined. Consequently, what needed to be decided by the Judge, in the context of the summary trial, was first whether the Port Authority had a proprietary or possessory interest in the property damaged by the *Cape Apricot*. If that hurdle was met, then the question was whether the Port Authority's claim fell within the exceptions to the rule which precludes recovery of a pure economic loss. In other words, could the Port Authority show, in all of the circumstances, that because of its proprietary or possessory interest in the damaged property, Leo owed it a duty of care? In order to make such determinations, the Judge makes it clear in her reasons that the interpretation of the lease provisions is crucial.

[34] In my view, there can be no doubt, based on the Judge's reasons, that the principal issue before her was the construction of the lease. In other words, construction of the lease will provide the answer to the question of whether or not the Port Authority has a proprietary or contingent possessory interest in the leased premises.

[35] Before us at the hearing the parties reiterated the view that there was no issue of credibility to be determined. Further, they did not argue or suggest that discovery would lead to the introduction of additional evidence relevant to the interpretation of the lease. It is also a relevant factor, although not determinative, that the Port Authority did not take the position before the Judge that the matter was not one suitable for determination by way of a summary trial. Although counsel for the Port Authority attempted to defend the Judge's decision, he did not contend that the test for summary trial was not met in the circumstances.

[36] With the greatest of respect for the Judge, I am of the opinion that her reasons support the view that summary trial was the appropriate vehicle to determine the issues before her. In other words, the Judge's reasons show that the main task for her in the summary trial was the interpretation of the lease and a determination of the legal consequences which flowed from that interpretation. It is important to point out that none of the parties, nor the Judge, suggested that there was evidence, not already in the record, that was required for the Judge to perform her task.

[37] Consequently, the Judge was in error in concluding, as she did, that the matter before her was not one that should be determined by way of summary trial. I am satisfied that the test set out by Hughes J. in *Teva, supra* is met in the present matter. More particularly, to paraphrase the

words of Hughes J., the issues are well defined and a disposition of these issues will in all likelihood resolve, one way or the other, the Port Authority's claim. The facts necessary to resolve the issues are already in the evidence, that evidence is not controversial and there are no issues of credibility. The questions of law, although far from simple, can be dealt with as easily now as they could otherwise after a full trial.

[38] In the memorandum of fact and law which he filed in this appeal, counsel for Leo invited us to make the determination which he says the Judge ought to have made. In other words, counsel invited us to determine the meaning of the lease provisions at issue and determine whether or not the Port Authority's claim falls within one of the exceptions to the rule barring the recovery of pure economic loss. In that respect, counsel for Leo was joined by counsel for the Port Authority.

[39] In my view, we should not accede to this request. Rather, we should return the matter to the Federal Court so as to allow it to determine the meaning of the relevant provisions of the lease and the consequences, if any, which flow from that determination.

[40] I come to this conclusion for two reasons. The first one is that in most cases, and this case is no exception, this Court will benefit greatly from the view of the Judge of first instance. The second reason is that I am not satisfied that the substantive issues which the parties wish us to determine were argued as fully as they should have been. On the one hand, the respective memoranda of fact and law filed by Leo and the Port Authority do not deal with the substantive issues which the parties say the Judge ought to have decided and which they now ask us to

decide. When asked at the hearing why there was no such argument in his memorandum, counsel for Leo informed us that he believed that his arguments were necessarily limited to those that had been made at first instance before the Judge. He was supported in that view by counsel for the Port Authority.

[41] We then invited counsel to argue the substantive issues but they contented themselves with, in effect, an overview of their arguments. In other words, they summarily explained their respective positions preferring however, for the most part, to refer us to the written representations filed before the Federal Court. In saying this I do not wish to be understood as criticizing counsel who seemed to be under the belief, albeit mistaken in my view, that it was not open to them, either in their written memoranda or orally before us, to make arguments which differed in any way from those which they had made before the Federal Court. This no doubt explains why, in the end, they preferred to refer us to their arguments below.

[42] Consequently, in these circumstances, it is my view that it would be preferable to return the matter to the Federal Court for determination of the issues raised by the motion for summary trial.

IV. Conclusion

[43] I would therefore allow the appeal with costs, I would set aside the judgment of the Federal Court and I would return the matter to the Chief Justice of the Federal Court for redetermination, by him or by one of the judges of the Court, of the question of whether or not

the Port Authority's claim is one that should be struck or allowed to be pursued against the limitation fund to be constituted by Leo.

"M Nadon"

J.A.

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

"I agree.
Donald J. Rennie J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-50-15
(APPEAL FROM A JUDGMENT OR ORDER OF THE HONOURABLE MADAM JUSTICE HENEGHAN DATED FEBRUARY 2, 2015, DOCKET NO. T-605-13)	
STYLE OF CAUSE:	LEO OCEAN S.A. v. WESTSHORE TERMINALS LIMITED PARTNERSHIP by its General Partner WESTSHORE TERMINALS LTD., WESTSHORE TERMINALS INVESTMENT CORPORATION, WESTAR MANAGEMENT LTD., and VANCOUVER FRASER PORT AUTHORITY
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	NOVEMBER 17, 2015
REASONS FOR JUDGMENT BY:	NADON J.A.
CONCURRED IN BY:	SCOTT J.A. RENNIE J.A.
DATED:	DECEMBER 9, 2015

APPEARANCES:

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