Date: 20090417

Docket: A-363-08

Citation: 2009 FCA 119

CORAM: **DÉCARY J.A.**
SHARLOW J.A.
RYER J.A.

BETWEEN:

TIMBERWEST FOREST CORP.

Appellant

and

PACIFIC LINK OCEAN SERVICES CORPORATION,
UNION TUG AND BARGE LTD.,
GREAT NORTHERN MARINE TOWING LTD.,
A.B.C. COMPANY,
WARREN SINCLAIR, MARK MCLEAN, KENNETH HEMEON,
and the owners and others interested in the ships
"SEA COMMANDER" and "OCEAN OREGON"

Respondents

Heard at Vancouver, British Columbia, on January 27, 2009.

Judgment delivered at Ottawa, Ontario, on April 17, 2009.

REASONS FOR JUDGMENT BY: SHARLOW J.A.

CONCURRED IN BY: DÉCARY J.A.
RYER J.A.

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] This is an appeal of the judgment of Justice Harrington dated June 25, 2008 (2008 FC 801) answering four questions raised in an action for damages resulting from the loss of logs that were being transported from British Columbia to California on the deck of a barge. The questions are aimed at determining whether the insurer is precluded from asserting a subrogated claim against the time charterer of the barge and the tug, the owner of the barge and its employees, and the owner of the tug and its employees. Justice Harrington's answers protect all of those parties from the subrogated claim. The issue in this appeal is whether these answers are correct in law.

Facts

[2] The facts are undisputed. The appellant Timberwest Forest Corp. (“Timberwest”), a British Columbia corporation, carried on a business that included the sale and export of logs. One of the customers of Timberwest was Harwood Products Inc. (“Harwood”), a California corporation.

[3] The respondent Pacific Link Ocean Services Corporation (“Pacific Link”), a Barbados corporation, was the time charterer of the barge Ocean Oregon from which the cargo was lost. Pacific Link was also the time charterer of the tug Sea Commander, which was towing the Ocean Oregon when the cargo was lost. The barge Ocean Oregon was owned by the respondent Great Northern Marine Towing Ltd. (“Great Northern”), a British Columbia corporation. The tug Sea Commander was owned by the respondent Union Tug and Barge Ltd. (“Union Tug”), also a British Columbia corporation. The respondents Warren Sinclair and Marc McLean were employees of Great Northern. The respondent Kenneth Hemeon was the Captain of the Sea Commander and an employee of Union Tug. None of the individual respondents was employed by Pacific Link.

[4] Pacific Link, Great Northern and Union Tug were each owned as to 50% by Peter Brown and 50% by Ed Jackson. The services of the three corporations were marketed together under the name “Sea Link Group”. That fact was known to Harwood and Justice Harrington inferred that it was also known to Timberwest.

[5] Timberwest began selling logs to Harwood in the late 1990s for export to Eureka, California. The initial sales contracts provided that the logs would be delivered FOB Timberwest’s

storage yards in British Columbia. Under those contracts, the logs were at Harwood's risk during transportation, and Harwood made the transportation and insurance arrangements.

[6] In 2001, Timberwest began to sell logs for export under contracts that left the title and risk with Timberwest until payment. The first such sale was to a customer other than Harwood. For that sale, Timberwest entered into a contract of carriage with Brusco Tug & Barge Inc., an American corporation. That contract of carriage provided that neither the carrier nor the vessels used would be liable for loss or damage to the cargo from any cause. Timberwest was required to obtain an all risk marine cargo insurance policy, with the carrier and its affiliates named as additional insured parties and with a full waiver of subrogation against them, any vessel used in the performance of the contract, and the master and crew of any such vessel.

[7] Timberwest contacted Mr. Sikorski, an insurance broker employed by Marsh Canada Ltd., to obtain the required insurance coverage for this transaction. Mr. Sikorski obtained from St. Paul & Marine Insurance Company ("St. Paul") an endorsement to an existing marine insurance policy of Timberwest that met all of the contractual requirements, including the naming of Brusco Tug & Barge Inc. as an insured party. That insurance policy was used as a template for subsequent insurance policies covering logs sold by Timberwest to Harwood between April of 2002 and November of 2003.

[8] In April of 2002, Timberwest made its first sale of logs to Harwood in which Timberwest would retain title and risk until payment and delivery. For that sale, and for subsequent sales to

Harwood up to and including sales in November of 2003, it was agreed that Harwood would choose the shipper and arrange for the shipping. Timberwest has admitted that it is bound by the terms of the contract of carriage entered into by Harwood. Justice Harrington concluded that Timberwest was so bound because Harwood, in arranging for the shipping, was acting as agent for Timberwest as its undisclosed principal. That conclusion is not challenged in this appeal.

[9] Timberwest relied on Mr. Sikorski at Marsh Canada Ltd. to obtain the appropriate coverage for its insurable interest in the logs sold to Harwood. For the purpose of putting the appropriate coverage in place, Mr. Sikorski obtained the contract of carriage from Harwood's British Columbia agent, Robeth Holdings Ltd. No one at Timberwest paid attention to the terms of the insurance policies obtained by Mr. Sikorski for the Harwood transactions.

[10] The contract of carriage for the 2002 sales to Harwood took the form of a letter of understanding from Pacific Link to Harwood dated April 29, 2002. That letter states that Pacific Link would "supply a barge" to deliver logs from the Fraser River to Eureka. The barge named was the Ocean Oregon. In addition to a number of specific conditions, the letter states, "Standard Towing Terms and Conditions are attached". One of the conditions in the attached document reads as follows:

> All contracts of carriage shall be governed by the terms and conditions of the Pacific Link Ocean Services Corp. standard form Bill of Lading as amended from time to time and shall apply whether or not such Bill of Lading is actually issued in respect of any particular cargo.

[11] The Pacific Link standard form bill of lading states, in bold type on the first page, "ALL GOODS ARE CARRIED ON DECK AT SHIPPER'S RISK (see Clause 9 on reverse or attached hereto)". Clause 9 of the Pacific Link standard form bill of lading reads as follows:

> DECK CARGO. All cargo is carried on deck unless otherwise expressly stated in this Bill of Lading. Cargo carried on deck is carried at the sole risk of the owner thereof. In no event shall the Carrier be liable for any loss or damage in respect of cargo carried on deck, howsoever caused, and without limiting the generality of the foregoing, even though resulting from unseaworthiness or from the negligence, gross negligence, default, error or omission of the Carrier or of the servants or agents of the Carrier, including without limiting the foregoing, all persons described in clause 14 herein.

[12] Clause 14 of the Pacific Link standard form bill of lading reads as follows:

> 14. BENEFICIARY OF CONTRACT. Every employee, agent and independent contractor of the Carrier, and the owner, operator, manager, charterer, master, officers and crew members of any other vessels owned or operated by related or unrelated companies, and stevedores, longshoremen, terminal operators and others used and employed by the Carrier in the performance of its work and services shall be beneficiaries of this Bill of Lading and shall be entitled to all defences, exemptions and immunities from and limitations of liability which the Carrier has under the provisions of this Bill of Lading and, in entering into this contract, the Carrier to the extent of those provisions, does so not only on its own behalf but also as agent and trustee for each of the persons and companies described herein, all of whom shall be deemed parties to the contract evidenced by this Bill of Lading.

[13] Harwood had been provided with a copy of the Pacific Link standard form bill of lading prior to 2003. Neither Timberwest, Marsh Canada Ltd. nor St. Paul requested or received a copy of

that document until after the loss that gave rise to this proceeding. However, Justice Harrington concluded, and I agree, that they are all bound by it.

[14] St. Paul agreed to name Pacific Link as an insured party under the Timberwest insurance contract, and to waive its rights of subrogation against Pacific Link, in respect of the April 2002 shipment of logs from Timberwest to Harwood as well as two further shipments in May of 2002. The inclusion of the waiver of subrogation in favour of Pacific Link for those shipments was formally effected by way of an endorsement dated July 15, 2002. In respect of each of those shipments the endorsement reads as follows:

> Additional Insured with waiver of subrogation: Pacific Link Ocean Services Corporation

[15] The Timberwest marine insurance policy was renewed for the policy year July 2002-July 2003 and the policy year July 2003-2004. The terms of those policies are substantially the same, with the endorsements from the prior policy being included in the terms. The following provisions appear in the 2004 policy, in the section entitled “General Conditions”:

> **6. ADDITIONAL INSUREDS**
>
> In respect of the property Insured hereunder it is agreed that, in addition to the Named Insured hereon, this policy also insures: […]
>
> b) any owner, any person, entity, firm, organization, trustee, estate or governmental entity for whom or for which the Insured has agreed to insure, assumed the obligation to indemnify or the responsibility to place insurance under any contract, agreement or by the issuance of existence of any permit;

[…]

d) other entities as may be named in any sections of this policy and/or endorsements hereon.

Nothing contained herein shall entitle the Additional Insureds to recover from the Underwriters any greater amount than would be recoverable by the Named Insured.

It is agreed that Underwriters rights of subrogation against Additional Insureds are waived.

It is expressly understood that such insurance as is provided by this policy to the Named Insured herein shall not be invalidated nor the Underwriters liability limited or lessened by any act or neglect of an Additional Insured.

[…]

19. SUBROGATION

Applicable to All Sections

Insofar as the Insured may have waived, prior to any loss or damage, any right of recovery, from any person or corporation (including transportation companies) for loss or damage to the property described herein, Underwriters, to that extent, waive their rights of Subrogation under this contract. […]

Applicable to Section III

It is hereby agreed that upon payment of a claim for loss and/or damage, Underwriters are to be subrogated to all the rights of the Insured under Bills of Lading, Shipping Receipts or other contracts and against all third parties to the extent of such payments […]. Underwriters shall not be subrogated to any rights which the Insured has expressly waived in writing prior to loss. […].

[16] The following terms appear in the section entitled “Section III – Marine Cargo”:

> **Item D – Export Logs**
>
> […]
>
> Including Waiver of subrogation against:
> - Brisco Tug & Barge, Inc.
> - Pacific Link Ocean Services Corporation

[17] After the occurrence of the loss that gives rise to this proceeding, Pacific Link became aware that it was mentioned in the waiver of subrogation clause of the contract of insurance between Timberwest and St. Paul, and in the endorsement in the prior contracts of insurance. Justice Harrington concluded, and I agree, that its prior lack of knowledge is not relevant.

[18] Mr. Sikorski apparently assumed that there was no relevant difference between the transportation arrangements involving Brusco Tug & Barge Inc. as carrier, and those involving Pacific Link as carrier. He explained that he did not receive the contract of carriage for the first Harwood shipment in April of 2002 until after that shipment had already left. He did not know at that time, and apparently did not ask, whether Pacific Link was the owner or the time charterer of the barge and tug that would be used to transport logs sold by Timberwest to Harwood in that first sale. Nor did he explore that question later when the new policies were issued for the 2003 and 2004 policy years, but simply incorporated the previously issued endorsements into the policy.

[19] The cargo in issue in this case consisted of 11,463.17 cubic metres of Douglas fir logs that Timberwest sold to Harwood between September and November of 2003. Harwood entered into a

contract of carriage with the respondent Pacific Link to transport those logs from the Timberwest storage yards to Eureka, along with a further 815 cubic metres of logs owned by Harwood and in which Timberwest had no interest. The terms of the contract of carriage were substantially the same as the contract of carriage described above relating to the April 2002 sale. Like the previous contract of carriage, the Pacific Link standard form bill of lading was incorporated by reference.

[20] At all material times, Timberwest, Harwood and Pacific Link were aware that the logs would be carried on the deck of the barge Ocean Oregon. In early November of 2003, the logs were loaded onto the deck of the Ocean Oregon, which was towed by the Sea Commander on the voyage to Eureka. On November 11, 2003, nearly 10,000 cubic metres of the logs owned by Timberwest, and approximately 764 cubic metres of the logs owned by Harwood, were lost at sea. The record does not disclose the cause of the loss.

[21] The loss of the logs resulted in a loss to Timberwest of approximately $1 million. Timberwest's claim in excess of the deductible was paid by the insurer St. Paul which, through Timberwest, is pursuing a subrogated claim against Pacific Link and the other respondents.

[22] St. Paul's subrogated claim has given rise to a number of issues. One issue is whether the waiver of subrogation in favour of Pacific Link is invalidated by the *Marine Liability Act*, S.C. 2001, Schedule 3 (the *Hague-Visby Rules*). If not, there is an issue as to whether the respondents other than Pacific Link are also entitled to the benefit of a waiver of subrogation.

[23] Four questions arising from these issues were ordered to be severed and determined in a preliminary proceeding. The four questions, and Justice Harrington's answers, are as follows:

a) Is the contract of carriage governed by the *Hague-Visby Rules*?

Answer: The contract of carriage is not governed by the *Hague-Visby Rules*.

b) Is the cargo "goods" as that term is defined in the *Hague-Visby Rules*?

Answer: The cargo is not "goods" as defined in the *Hague-Visby Rules*. Although the shipment was "covered" by a bill of lading, that bill of lading, if issued, would have stated the entire shipment was being carried on deck, as indeed was the case.

c) Is the waiver of subrogation clause in favour of Pacific Link in the insurance policy of the plaintiff rendered null and void and of no force or effect by the *Hague-Visby Rules*?

Answer: The waiver of subrogation in favour of Pacific Link contained in Timberwest's insurance policy was not rendered null and void and of no force or effect by the *Hague-Visby Rules*. Pacific Link is a third party beneficiary and entitled to assert the clause against St. Paul.

d) If not, may the defendants other than Pacific Link rely upon the waiver of subrogation clause?

Answer: The other defendants are all third party beneficiaries of one or more waiver of insurance clauses, and likewise entitled to assert them against St. Paul. These defendants were the owners of the tug and tow, the master of the tug, and either crew or stevedores servicing the barge. As such, they were all parties to and given exemptions and immunities under the contract of carriage. In turn, they are additional insureds with benefit of a waiver of subrogation granted them by St. Paul.

The *Hague-Visby Rules*

[24] The Court did not call upon the respondent to speak to Timberwest's appeal from Justice Harrington's answers to the first three questions. I will explain why.

[25] By virtue of section 43 of the *Marine Liability Act*, 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 the *Hague-Visby Rules*. The contract of carriage in this case is within the scope of Article X.

[26] Article III of the *Hague-Visby Rules* sets out a number of responsibilities and liabilities of carriers and ships. Section 8 of Article III of the *Hague-Visby Rules* limits the ability of carriers and ships to contract out of those obligations. It reads as follows:

8. Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect.	8. Toute clause, convention ou accord dans un contrat de transport exonérant le transporteur ou le navire de responsabilité pour perte ou dommage concernant des marchandises provenant de négligence, faute ou manquement aux devoirs ou obligations édictés dans le présent article ou atténuant cette responsabilité autrement que ne le prescrivent les présents règles sera nul, non avenue et sans effet.

[27] The contract of carriage in this case, which includes the bill of lading, contains clauses limiting the liability of the carrier for the loss of the cargo. However, clause 8 of Article III invalidates those clauses only if the cargo meets the definition of "goods" in the *Hague-Visby Rules*. The word "goods" is defined as follows in Article I:

In these Rules the following expressions have the meanings assigned to them respectively, that is to say, […] (*c*) "goods" includes goods, wares, merchandise and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried […].	Dans les présentes règles, les mots suivants sont employés dans le sens précis indiqué ci-dessous : […] *c*) « marchandises » comprend : biens, objets, marchandises et articles de nature quelconque, à l'éxception des animaux vivants et de la cargaison qui, par le contrat de transport, est déclaré comme mise sur le pont et, en fait, est ainsi transportée […].

[28] Justice Harrington concluded that the cargo of logs in this case did not come within the statutory definition of "goods", and therefore clause 8 of Article III could not be applied to invalidate the clauses limiting the carrier's liability, because (1) the cargo was in fact carried on deck (indeed, as all parties were aware, there was no other way to carry logs on the Ocean Oregon), and (2) clause 9 of the Pacific Link standard form bill of lading, which is part of the contract of carriage, states that "All cargo is carried on deck unless otherwise expressly stated in this Bill of Lading."

[29] It was argued for Timberwest on appeal that Justice Harrington erred in relying on clause 9 of the Pacific Link standard form bill of lading, when provisions in the Standard Towing Terms and Conditions indicated an intention that the *Hague-Visby Rules* would apply. These apparent inconsistencies, it was argued, justify the Court in construing the contract of carriage *contra proferentum*, that is, in Timberwest's favour. I cannot accept that argument. No contractual terms are inconsistent with the terms stating that the cargo would be carried on deck, as all parties knew would necessarily be the case.

[30] The Court concluded after hearing the submissions of Timberwest that Justice Harrington made no error of law when he concluded that the cargo of logs was not "goods" as defined in the *Hague-Visby Rules*, and therefore the contract of carriage was not governed by the *Hague-Visby Rules*, and the waiver of subrogation clause in the contract of insurance was not invalidated by the *Hague-Visby Rules*. That disposed of the appeal in respect of the first three questions.

Beneficiaries of the waiver of subrogation

[31] The fourth question arises because it was argued for Timberwest that, even if the *Hague-Visby Rules* do not apply, the named respondents other than Pacific Link are not entitled to benefit of any waiver of subrogation.

[32] I note parenthetically that Pacific Link's entitlement to rely on a waiver of subrogation is not the subject of the fourth question because there is a specific provision in Section III, Item D (quoted above) which says, "Including Waiver of subrogation against … Pacific Link Ocean Services

Corporation." There can be no doubt that Pacific Link is entitled to the benefit of that clause because it is expressly named.

[33] As I understand the evidence, it is normal in a contract of marine insurance to name in a specific waiver of subrogation clause all parties against whom the insurer knows it cannot pursue a subrogated claim. However, that does not mean that a person who is not so named cannot benefit from a general waiver of subrogation, if one appears in the contract of insurance. In this case, such a general waiver of subrogation is found in section 19 of the contract of insurance. The relevant part of section 19 is quoted above and repeated here for ease of reference:

> **19. SUBROGATION**
>
> **Applicable to All Sections**
>
> Insofar as the Insured may have waived, prior to any loss or damage, any right of recovery, from any person or corporation (including transportation companies) for loss or damage to the property described herein, Underwriters, to that extent, waive their rights of Subrogation under this contract. […]
>
> **Applicable to Section III**
>
> It is hereby agreed that upon payment of a claim for loss and/or damage, Underwriters are to be subrogated to all the rights of the insured under Bills of Lading, Shipping Receipts or other contracts and against all third parties to the extent of such payments […]. Underwriters shall not be subrogated to any rights which the insured has expressly waived in writing prior to loss […].

[34] As Justice Harrington points out in paragraph 65 of his reasons, even without section 19 of the contract of insurance, St. Paul would have no greater rights against the carrier than would Timberwest (referring to section 81 of the *Marine Insurance Act*, 1993, S.C. 22). However, section 19 goes further. It is an express waiver of subrogation against persons who meet a certain description, namely, those against whom the insured (Timberwest) has, before the loss or damage, waived the right of recovery. A party meeting that description is entitled to the benefit of the waiver of subrogation in section 19, whether or not it is specifically named in a separate waiver of subrogation clause (although it might be so named for greater certainty).

[35] Who, then, are the persons against whom Timberwest waived a right of recovery prior to the loss? The answer is found in the Pacific Link bill of lading, which is part of the contract of carriage. As noted above, the Pacific Link standard form bill of lading states, in bold type on the first page, "ALL GOODS ARE CARRIED ON DECK AT SHIPPER'S RISK (see Clause 9 on reverse or attached hereto)", and clause 9 reads as follows:

> DECK CARGO. All cargo is carried on deck unless otherwise expressly stated in this Bill of Lading. Cargo carried on deck is carried at the sole risk of the owner thereof. In no event shall the Carrier be liable for any loss or damage in respect of cargo carried on deck, howsoever caused, and without limiting the generality of the foregoing, even though resulting from unseaworthiness or from the negligence, gross negligence, default, error or omission of the Carrier or of the servants or agents of the Carrier, including without limiting the foregoing, all persons described in clause 14 herein.

[36] Clause 9 must be read in light of the contractually defined terms. The word "Carrier" is defined in the Pacific Link standard form bill of lading to include "the ship, shipowner, operator,

manager, charterer, master, officers, crew, stevedores and all others concerned in the carriage of the goods." The word "ship" is defined to include "any tug, barge or other vessel used by the Carrier in the performance of the contract". Clause 9 must also be read with clause 14, which reads as follows:

> 14. BENEFICIARY OF CONTRACT. Every employee, agent and independent contractor of the Carrier, and the owner, operator, manager, charterer, master, officers and crew members of any other vessels owned or operated by related or unrelated companies, and stevedores, longshoremen, terminal operators and others used and employed by the Carrier in the performance of its work and services shall be beneficiaries of this Bill of Lading and shall be entitled to all defences, exemptions and immunities from and limitations of liability which the Carrier has under the provisions of this Bill of Lading and, in entering into this contract, the Carrier to the extent of those provisions, does so not only on its own behalf but also as agent and trustee for each of the persons and companies described herein, all of whom shall be deemed parties to the contract evidenced by this Bill of Lading.

[37] Reading all of these provisions together, the Ocean Oregon and the Sea Commander, as well as their respective owners and their owners' employees, are within the contractual definition of "Carrier", in so far as they are concerned in the carriage of the cargo. As persons within that definition, they are entitled to "all defences, exemptions and immunities from and limitations of liability which the Carrier has under the provisions of this Bill of Lading". That is emphasized by the provision that Pacific Link entered into the contract of carriage not only on its own behalf but also "as agent and trustee for each of the persons and companies described herein, all of whom shall be deemed parties to the contract evidenced by this Bill of Lading."

[38] It is sufficiently clear that Timberwest waived the right to make a claim against all of the named respondents for the loss of the cargo of logs. In my view, that brings all of them within the general waiver of subrogation in section 19 of the contract of insurance.

[39] For these reasons, I agree with Justice Harrington that all of the named respondents are entitled to the benefit of a waiver of subrogation.

Conclusion

[40] I would dismiss the appeal with costs.

"K. Sharlow"
J.A.

"I agree.
Robert Décary J.A."

"I agree.
C. Michael Ryer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-363-08
(APPEAL FROM A JUDGMENT 0F JUSTICE HARRINGTON DATED JUNE 25, 2008, NO. T-1999-04 (2008 FC 801)	
STYLE OF CAUSE:	Timberwest Forest Corp. v. Pacific Link Ocean Services Corporation et al
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	January 27, 2009
REASONS FOR JUDGMENT BY:	SHARLOW J.A.
CONCURRED IN BY:	DÉCARY J.A. RYER J.A.
DATED:	April 17, 2009

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