Federal Court Cour fédérale

Date: 20120412

Docket: T-1148-01

Citation: 2012 FC 418

BETWEEN:

UNIVERSAL SALES, LIMITED, ATLANTIC TOWING LIMITED, J. D. IRVING, LIMITED, IRVING OIL COMPANY, LIMITED AND IRVING OIL LIMITED

Plaintiffs

and

EDINBURGH ASSURANCE CO. LTD., ORION INSURANCE CO. LTD., BRITISH LAW INSURANCE CO. LTD., ENGLISH & AMERICAN INS. CO. LTD., ECONOMIC INSURANCE CO. LTD., ANDREW WEIR INS. CO. LTD., INSURANCE CO. OF NORTH AMERICA, LONDON & EDINBURGH GENERAL INS. CO. LTD., OCEAN MARINE INS. CO. LTD., ROYAL EXCHANGE ASSURANCE, SUN INSURANCE OFFICE LTD., SPHERE INSURANCE CO. LTD., DRAKE INSURANCE CO. LTD., EAGLE STAR INSURANCE CO. LTD. AND STEPHEN ROY MERRITT, AS REPRESENTATIVE OF UNDERWRITERS SUBSCRIBING TO LLOYD'S POLICY NO. 614/B94656-A/1582

Defendants

REASONS FOR JUDGMENT

HARRINGTON J.

[1] This is a marine insurance coverage case. The plaintiffs seek indemnity from the defendant underwriters, on policies written in 1970, for sums paid to the Canadian government in 2000 in settlement of an action for the cost of refloating the tank-barge Irving Whale and her cargo in 1996,

for the cost of defending that action, and for sue and labouring expenses allegedly incurred on underwriters' behalf. The underwriters deny liability. They say the plaintiffs were not liable, or, if they were, their liability was not covered by the policies.

[2] In these reasons I shall refer to the plaintiffs as "the Irving Group" (unless otherwise differentiated) and to the Canadian government as "the Crown".

[3] On 7 September 1970, the Irving Whale, under tow of the tug Irving Maple, set sail from Halifax, Nova Scotia, bound for Bathurst, New Brunswick where she was to deliver her cargo of 4,270 metric tons of Bunker C fuel oil. She never arrived. She sank that day in the Gulf of St. Lawrence where she lay 37 fathoms below the surface for 26 years, until the Crown raised her.

[4] In the short-term aftermath of her sinking, some of her cargo escaped and fetched up onto the shores of the Magdalen Islands, and to a lesser extent onto Prince Edward Island and Cape Breton. The Crown monitored the situation over the years and, from time to time, took remedial steps such as blocking vents from which oil was escaping. Nevertheless, seepage was observed. Come the 1990s, based on in-house advice and outside reports it commissioned, the Crown finally came to realize that the Irving Whale was a time bomb. Sooner, rather than later, she would corrode and break up, releasing well over 3,000 m.t. of oil to the great prejudice of the marine habitat, the shoreline, and those dependent upon the sea and shore. Although the wisdom of the Crown's decision has not been challenged in these proceedings, the timing has. The defendants argue, and I agree, that the government of the day was pursuing a political agenda. This was post Exxon Valdez, and the principle of "polluter pays" was in vogue. However, although the precise timing of the

refloating may have been political, the fact remains that the Irving Whale would have broken up, probably sooner, rather than later.

[5] The Irving Group were put on notice beforehand that they would be held accountable for the cost of raising the Irving Whale and neutralizing both her and her cargo. Indeed, they were provided with copy of reports which indicated that the cost would run into the millions, certainly far more than $5,000,000, an important figure, as it was the limit of the liability insurance coverage provided by the defendants.

[6] The Irving Group, one or more of whom were the owners, charterers and operators of the tug and tow, as well as the owners of the oil, offered to co-operate by providing, at no charge unless there were an actual spill during refloating, standby assistance during that operation and then by taking the Irving Whale in hand, cleaning her and disposing of the pollutants being some of the oil cargo, as well as polychlorinated biphenyls (PCBs) which formed part of the Irving Whale's heating system, and asbestos.

[7] The refloating was to take place in 1995. It was aborted that year as a result of an injunction issued by Mr. Justice Richard, as he then was, in *Société pour vaincre la pollution Inc v Canada (Minister of the Environment)*, 57 ACWS (3d) 397, [1995] FCJ No 1129 (QL). He ordered a stay of the implementation of the decision pending the outcome of an application for judicial review. The serious issue to be tried was whether any substantial release of PCBs could have serious environmental consequences.

[8] However, the operation successfully proceeded in 1996 with no environmental consequences to speak of. The Irving Group took over the Irving Whale and her cargo at Halifax shipyard, cleaned her, and arranged for the destruction of the PCBs and oil contaminated with same. They sold the oil which was not contaminated, the proceeds of which at first instance were held by the Crown.

RECOVERY ACTION BY THE CROWN

[9] As anticipated, in 1997 the Crown took action against the Irving Group as well as the Administrator of the Ship-Source Oil Pollution Fund and the International Oil Pollution Compensation Fund 1971, parties by statute. As against the Irving Group, the claim was based upon statutory liability arising from the *Canada Shipping Act* and the *Oil Pollution Prevention Regulations* thereunder, as well as common law negligence and nuisance. The amount claimed was in excess of $42,000,000.

[10] The Irving Group were originally represented by Osler, Hoskin & Harcourt who filed a Statement of Defence and Counterclaim for a declaration that if liable they were entitled to limit that liability in accordance with the provisions of the *Canada Shipping Act*. However, due to a conflict of interest, they were subsequently replaced by the firm of Ogilvy Renault. This change of solicitors figures prominently in the defence costs portion of the present claim.

[11] The Irving Group moved to have the action dismissed as against them on the grounds of time bar. In *Canada v J.D. Irving, Ltd*, [1999] 2 FC 346, 159 FTR 282, Mr. Justice Hugessen granted their motion in part. He held that to the extent the claim was based on the pollution

provisions of the *Canada Shipping Act* and regulations thereunder, it was time-barred. However, he also held that the necessary facts were not before him which would allow him to dismiss the action based on the torts of negligence and nuisance, both of which might be of a continuing nature. The action was also dismissed against the other defendants.

[12] During the course of subsequent proceedings, before the examination for discovery of Crown representatives was completed and before the examination for discovery of the Irving Group began, the action was settled for $5,000,000. The Irving Group paid $4,709,501.86 and agreed that the Crown keep the proceeds of the sale of the clean oil recuperated from the Irving Whale which were $290,498.14. The Irving Group also got to keep the Irving Whale which is still in operation today as a wood chip barge.

INSURANCE COVERAGE

[13] The relationship between the Irving Group and the defendant underwriters is somewhat peculiar in that during the time the Group arranged with the Crown to provide standby services and to remediate the Irving Whale and her cargo, they had no details of their insurance coverage. In August 1995, Bruce Drost, an in-house counsel at J.D. Irving, Limited, wrote to Reed Stenhouse Limited to say that it was his understanding they were the broker who arranged various insurance coverages including hull & machinery, and third party liability, (primary and excess). The purpose of the letter was to state that the Crown had awarded a contract to lift the barge and to provide notice of potential claims.

[14] Mr. Drost, who only joined J.D. Irving, Limited, in 1978, testified he could not find copy of the policies in question, but obtained policy numbers from an adjustment report prepared following the sinking in 1970. The underwriters had difficulty retrieving the policies, and it was only in April 1997 that Reed Stenhouse provided Mr. Drost with copies thereof. Reed Stenhouse also pointed out that three of the underwriters, Orion Insurance Co. Ltd., Andrew Weir Ins. Co. Ltd., and English & American Ins. Co. Ltd. were under the control of a liquidator.

[15] Although the underwriters were not only put on notice of a potential claim, but also the claim as later specifically formulated, the action, and the settlement, they did not engage in any dialogue as they were under the impression that the Irving Group had agreed to absorb the legal fees of Ogilvy Renault in any event, and that it was unlikely that the Crown would succeed in its action.

[16] At the time of the casualty in 1970, the Irving Group had various insurance policies in place. This action is only concerned with excess third party liability. The primary liability cover was with a mutual protection and indemnity association (a P&I Club), the London Steam-Ship Owners' Mutual Insurance Association Limited, managed by A. Bilbrough & Co., Ltd. Its cover was limited to Canadian $200,000 for any one accident or occurrence including pollution. The "Club" originally paid out a few thousand dollars in 1971 and paid out the balance of the $200,000 in 2001. That decision, for whatever reason it was made, is not binding on the defendants herein. The failure of the Irving Group to seek and obtain prior approval of the settlement has not really been explained. Perhaps they thought, as set out in the Club's policy, that the standard P&I Club Oil Pollution Clause was in force. It reads: "Unless limited herein to a lesser sum, the liability of the Association is limited to US$14,400,000 in respect to oil pollution claims, other than claims under the

TOVALOP Agreement, (each vessel any one accident or occurrence).” Of course, in this case the Club’s liability was limited to a lesser sum.

[17] The insurance which is in issue is excess third party liability cover which was split between various Lloyd’s of London syndicates and Institute of London Underwriters companies; 71.36% with Lloyd’s and 28.24% with the companies. Both policies provide that the underwriters bind themselves each for their own part and not for one another, that is to say that their liability is several, not joint. This is relevant in that the defendants Orion Insurance Co. Ltd., English & American Ins. Co. Ltd., and Andrew Weir Ins. Co. Ltd., who were served, never filed an appearance. The reason given by counsel for the other underwriters is that by the time these proceedings were instituted they were in “run-off” or insolvent. In addition, counsel informed me that one of the companies they do represent, Economic Insurance Co. Ltd., has apparently now gone into run-off as well. However, counsel has not moved to cease representing Economic. In any event, all this information is anecdotal only and has no bearing on these reasons. Under Federal Courts Rule 184, the Irving Group still have to make their case. To the extent they obtain judgment, they may have some difficulty enforcing it in England against the defendants said to be in “run-off”, except to the extent they may have received dividends.

[18] The assureds are “J.D. Irving, Limited et al. and/or subsidiary and/or affiliated and/or associated companies.” The entire Group fits that description. During the term of the policy from February 1, 1970 to February 1, 1971, they were all ultimately 100% owned by K.C. Irving.

[19] However, the insurance was:

> …to cover the Legal and/or Contractual Liability of the Assured for all loss or expense resulting from the Legal and/or Contractual Liability of the Assured and/or their Employees and/or Agents and/or Vessels owned, chartered, or operated by the Assured for loss, damage and/or expense to others – arising out of or resulting from the ownership, use or operation of Vessels owned, chartered, or operated by the Assured…

[20] The tug Irving Maple was owned by Universal Sales, Limited and bareboat chartered to Atlantic Towing Limited. J.D. Irving, Limited was the owner of the Irving Whale which was also under bareboat charter to Atlantic Towing. Irving Oil Company, Limited was the owner of the cargo. Irving Oil Limited is its successor in corporate interest.

[21] The limit on liability coverage was $5,000,000, in excess of the $200,000 covered by the Club, subject to a $1,000 deductible.

[22] Although there was no contractual duty on the part of the underwriters to defend, the policy contained a sue and labour clause, the relevant portion of which reads:

> It shall be lawful for the Assured – to sue, labor and travel for, in and about the defense of any claim, suit or appeal from any judgment, it being understood and agreed that the costs and expenses of minimizing or establishing a liability of the Assured or defending any suit or suits against the Assured based on any liability or <u>alleged liability of the Assured as covered by this insurance</u> shall be payable by these Assurers.
>
> [My emphasis.]

[23] The policies were subject to English law. However that law has not been pleaded as a fact to differ from Canadian Maritime Law. Indeed with one minor exception, the (U.K.) *Marine Insurance Act*, 1906, and our *Marine Insurance Act*, SC 1993, c 22, are identical. At the time of the sinking in 1970, there was no federal marine insurance act. Nevertheless, as per *Ultramar Canada Inc v*

Mutual Marine Office Inc (the *Pointe Levy*), [1995] 1 FC 341, 1994 AMC 2409, [1994] FCJ No 1306 (QL), the English act formed part of the *lex non scripta* of Canadian Maritime Law.

[24] I will analyze the claim as broken down by the Irving Group into three components: sue and labour, liability and defence costs. The sums claimed, as slightly reformulated at trial, are as follows:

a. Sue and labour: $3,602,458.83;

b. Liability: $4,705,792.67; and

c. Defence costs: $1,800,000 (approximately).

[25] There may be an error in the calculation of the liability portion of the claim .The amount paid in settlement, excluding the net proceeds of the sale of the recuperated oil belonging to Irving Oil, who, as I will explain, was not covered, was $4,709,501.86. In addition, however, the underwriters at risk have to be given credit for the $200,000 paid by the P&I Club, and the $1,000 deductible. Consequently, the liability portion of the claim would appear to be $4,508,501.86.

[26] I say the defence costs are approximately $1,800,000 as a small portion thereof is expressed in either United States dollars or pounds sterling, unconverted.

SUE AND LABOUR

[27] Sections 79 and 80 of our *Marine Insurance Act* provide that if a marine policy contains a sue and labour clause, there is in fact supplementary insurance so that the insured may recover expenses properly incurred even if the underwriter has paid for a total loss. An insured is duty

bound to take "such measures as are reasonable for the purpose of averting or diminishing a loss under the marine policy."

[28] The insertion of a sue and labour clause is thus to benefit the underwriters. The *quid pro quo* is that the insured will be indemnified for expenses reasonably incurred which had the potential of benefiting the underwriter: see George R. Strathy (now Mr. Justice) and George C. Moore, *Law & Practice of Marine Insurance in Canada* (Markham, Ont: LexisNexis Canada, 2003) at 179-80.

[29] The sue and labour expenses incurred by the Irving Group began in 1995. At that time, they knew the Crown had let out a contract to Donjon Marine for $12.8 million and had been provided by the Crown with a report prepared in 1992 by Marex International Limited in which it estimated the combined costs of preventative measures and cargo extraction as being in excess of $21,000,000. Consequently, the sue and labour expenses incurred by the Irving Group in 1995 and 1996 could not possibly have benefited the underwriters, as the limit of their liability, if any, was $5,000,000. This is not to say that the Irving Group were foolhardy in incurring those expenses. As George Hill, retired vice-president of Atlantic Towing, testified, the Irving Group were of the opinion that they were the best. They stood by so as to minimize liability, which, if any, was already way over $5,000,000, in the event a spill incurred during refloating, and to make sure the rehabilitation of the Irving Whale and her cargo was done properly. Undoubtedly, the concept of acting like a good corporate citizen was also not far from the Group's mind.

[30] Consequently, the sue and labour portion of the claim shall be dismissed in its entirety. The fact that as part of that arrangement the Irving Group got to keep the Irving Whale is therefore not relevant.

THE UNDERWRITERS' CASE

[31] In broad strokes, on the liability issue, the underwriters take the position that the Irving Group were not liable to the Crown or, if they were, they paid too much. In any event, if they were liable, such liability is not covered by the policies. More specifically, the Irving Group were not liable to the Crown because:

a. there was no negligence;
   i. it has never been established that any member of the Irving Group or individuals for whom they were vicariously liable, was negligent;
b. public nuisance has no application as steps to abate should have been taken immediately, certainly not after an interval of 25 years;
c. they made a gratuitous payment to enhance their public image; and
d. the loss did not occur during the time frame covered by the policy.

[32] If they were liable, they paid too much as they were entitled to limit their liability as the loss occurred without their "actual fault or privity".

[33] If they were liable, the underwriters also say the Irving Group are not entitled to indemnity because:

a. claims which were once covered have become time-barred; or
b. they settled claims which were covered and claims which were not. As no proper "ascertainment" was made among the various heads of claim, they are not entitled to recover anything.

THE SETTLEMENT WITH THE CROWN

[34] Once the statutory oil pollution allegations were struck by Mr. Justice Hugessen, the balance of the claim sounded in negligence and in nuisance. The Crown was later given leave to amend its claim to also allege that the Irving Group breached a duty to warn of the presence of PCBs in the Irving Whale's heating system.

[35] Had the matter gone to trial, I consider it unlikely that any member of the Irving Group would have been found liable for failing to warn of the presence of PCBs. It is common ground in the proceedings before me that the Crown, at all relevant times, had a copy of the Irving Whale's plans which showed the heating system. Furthermore, the Marex Report, referred to above, identified the heating fluid as Monsanto MGS 295S. The Crown knew or should have known, that the prime ingredient in this brand name was PCBs, commonly used in heating systems at the time. According to the Crown's statement of claim, over $18 million of the over $42 million claimed relates to the aborted attempt to refloat in 1995, aborted as a result of the injunction. This brings the Crown's claim down to the $24 million range.

[36] It is not necessary to consider negligence, as I am satisfied that one or more of the Irving Group, with the exception of Irving Oil Company, Limited, and its successor Irving Oil Limited, would have been found liable in public nuisance to an amount in excess of $5 million. They may, or may not, have been able to limit their liability to $2,500,000, or less.

[37] That liability is based on public nuisance created by the polluters. There are common law and statutory nuisances, as well as private and public nuisances. One could certainly say that the relevant portions of the *Canada Shipping Act* and the regulations thereunder, which were held by Mr. Justice Hugessen to be inapplicable because of time bar, created a statutory nuisance. However, the Act did not abolish common law nuisance which is one, apart from statute, which violates principles recognized in the law for the protection of the public and individuals in the exercise and enjoyment of their rights.

[38] Then there is the distinction between public nuisance and private nuisance. This case deals with public nuisance which is one which inflicts damage, injury or inconvenience on all Her Majesty's subjects, or on such members of the class who come within the neighbourhood of its operation: see *Halsbury's Laws of England*, 5th ed, vol 78 (Markham, Ont: LexisNexis Canada, 2010) "Nuisance", at 99ff.

[39] The law of public nuisance was clearly stated by Lord Denning in two cases in the 1950s. In *Attorney General v P.Y.A. Quarries Ltd*, [1957] 1 All ER 894, [1957] 2 QB 169, he said at pages 908 and 191 respectively:

> …a public nuisance is a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large.

In an *obiter* in *Southport Corporation v Esso Petroleum Co, Ltd*, [1954] 2 QB 182 , [1954] 1 Lloyd's Rep 446, reversed on other grounds by the House of Lords at [1956] AC 218, [1955] 2 Lloyd's Rep 655, [1955] 3 All ER 864, he dealt with oil pollution as a public nuisance at page 196:

"Suffice it to say that the discharge of a noxious substance in such a way as to be likely to affect the comfort and safety of Her Majesty's subjects generally is a public nuisance." He continued on the following page: "Applying the old cases to modern instances, it is, in my opinion, a public nuisance to discharge oil into the sea in such circumstances that it is likely to be carried on to the shores and beaches of our land to the prejudice and discomfort of Her Majesty's subjects."

[40] A principal difference between an action for public nuisance and an action for negligence is the burden of proof. In *Southport*, above, Lord Denning continued at page 197:

> In an action for a public nuisance, once a nuisance is proved and the defendant is shown to have caused it, then the legal burden is shifted onto the defendant to justify or excuse himself. If he fails to do so, he is held liable whereas in an action for negligence the legal burden in most cases remains throughout on the plaintiff.

In this case no excuse has been made out.

[41] Although the underwriters do not appear to object to the Crown having removed the Irving Whale, and her cargo, at the taxpayers' expense, they submit that no action lay against the Irving Group because abatement is an exceptional self-help remedy, available only in an emergency. According to them, as a condition precedent the Crown would have had to have called upon the Irving Group to remove the Irving Whale themselves, that they would have refused, and that there would, at the very least, have had to have been a motion brought to Court for an order that the Irving Group remove the source of pollution. I do not see it that way. Although the Courts discourage self-help remedies, in this case, it was the community at large, through the Crown, that took the necessary steps to remove the nuisance. At one point or another, there would have been an

emergency, and it was far better to refloat the Irving Whale before she broke up. Leaving aside the time frame, this case is not unlike the *Queen v The Ship Sun Diamond et al*, [1984] 1 FC 3.

[42] In my opinion, the underwriters are elevating form over substance. As Lord Denning said in *Letang v Cooper*, [1964] 2 Lloyd's Rep 339, [1964] 2 All ER 929 at page 932:

> I must decline, therefore, to go back to the old forms of action in order to construe this statute. I know that in the last century MAITLAND said "the forms of action we have buried but they still rule us from their graves". But we have in this Century shaken off their trammels. These forms of action have served their day. They did at one time form a guide to substantive rights; but they do so no longer. Lord Atkin told us what to do about them:
>
> > When these ghosts of the past stand in the path of justice, clanking their mediaeval chains, the proper course for the judge is to pass through them undeterred. See *United Australia, Ltd. v. Barclays Bank, Ltd.* [1940] 4 All E.R. 20 at p. 37.

[43] Furthermore, if need be (and I do not see the need), if the claim does not fall within Canadian Maritime Law as it now is, it would be permissible to incrementally make a change thereto so as to hold that the Crown may delay in abating a public nuisance, without calling upon the creator of that nuisance to remove it: see *Canadian National Railway Co v Norsk Pacific Steamship Co*, [1992] 1 SCR 1021, [1992] SCJ No 40 (QL); *London Drugs Ltd v Kuehne & Nagel International Ltd*, [1992] 3 SCR 299, [1992] SCJ No 84 (QL); *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd*, [1997] 3 SCR 1210, [1997] SCJ No 111 (QL); *Ordon Estate v Grail*, [1998] 3 SCR 437, [1998] SCJ No 84 (QL); and *Fraser River Pile & Dredge Ltd v Can-Dive Services Ltd*, [1999] 3 SCR 108, [1999] SCJ No 48 (QL).

THE LIABILTY CLAIM AGAINST UNDERWRITERS

[44] The underwriters agreed to indemnify the Irving Group with respect to accidents arising during the period commencing 1 February 1970 and ending 1 February 1971. The long delay between the accident in 1970, and the expenses incurred by the Crown in 1995 and 1996, obviously gives rise to difficulties. Although the Irving Group eventually settled, they never admitted any liability, be it in negligence, nuisance or otherwise.

[45] The policies included a claims co-operation clause which provided that underwriters were not to be called upon to defend but had reserved the right to be given the opportunity to associate with the insured in the defence and control of any claim, suit or proceeding, which in the opinion of underwriters was likely to involve coverage. This clause is not relevant in that the underwriters were kept informed, never asked for the opportunity to associate with the defence and control of the proceedings and, in any event, were of the opinion that the claim was not likely to involve insurance coverage.

[46] The Court is called upon to determine if any member of the Irving Group was liable to the Crown, if that liability was covered by the policies, and whether that liability would have exceeded $5,000,000. By way of elimination, I am of the opinion that Irving Oil Company, Limited, and its successor, Irving Oil Limited, were not covered by the policy. Although they fall within the definition of insureds, they were not using the Irving Whale or the Irving Maple. Their cargo was simply onboard. They did not own, charter, operate, or use either the tug or tow.

[47] In my opinion, the $4,709,501.86 paid to the Crown did not cover any liability on the part of Irving Oil. Irving Oil was not the polluter. Irving Oil did not create the nuisance. Its potential liability to the Federal Crown is too remote. If, as and when the Bunker C oil reached shore, its liability would be engaged under provincial environmental statutes. Its turning over of the proceeds of the sale of the oil to the Federal Crown more than covers any liability to the Crown it might have had.

[48] As to which members of the Irving Group would have been found liable, one need only look to Atlantic Towing, the bareboat charterer of the Irving Whale. It was the polluter. It created the public nuisance.

[49] On the premise that the liability, if any, of the Irving Group was much greater than $5 million, the underwriters submit that the settlement should be apportioned between the insured and uninsured portion of the claim. On that basis, if we take as an example a realistic risk of liability of $20 million, and coverage of $5 million, only 25% of the settlement or $1,250,000 would fall upon the underwriters.

[50] This reasoning is flawed. It is based on the principle of underinsurance which applies to goods, not to liabilities. Section 88 of the *Marine Insurance Act* provides that if the insurance is less than the value of the subject matter insured, the insured is deemed to be self-insured with respect to the uninsured portion. Thus, if in a hull policy the cover is for $5 million but the ship is worth $10 million, in the event of $2 million damage the insured is deemed to be self-insured for 50%, and the underwriters would only pay out $1 million.

[51] This principle does not apply to a third party liability policy. If the liability were $2.5 million the underwriters would pay in full. If the liability were $5 million, the underwriters would pay in full. If the liability were $25 million, the underwriters would pay $5 million and the insured the balance: see Howard Bennett, *The Law of Marine Insurance*, 2nd ed (Oxford: Oxford University Press, 2006) at 23.51.

[52] Somewhat in the alternative, the underwriters argue that the payment in whole or in part was gratuitous. In my opinion it was not.

[53] The nuisance continued, and so the action was not time-barred under that heading. The six-year limitation under section 39 of the *Federal Courts Act* has no application as no part of the Crown's claim was for damage suffered more than six years before the refloating (*Robert v Portage la Prairie (City)*, [1971] SCR 481, [1971] SCJ No 53 (QL)).

[54] Undoubtedly, the Irving Group were conscious of their public image. However, in my opinion no part of the settlement should be considered as being gratuitous. The Group had earlier made a conditional $10 million settlement offer. At its heart, the Irving Group would have provided funding or have become involved in various projects in Atlantic Canada with which their name would have been prominently associated. However, it is not necessary to consider that offer as it was refused. Following the actual $5 million settlement, both the Crown and the Group issued press releases. The Group emphasized their cooperation and that both sides thought it appropriate to bring to an end a long, contentious and expensive piece of litigation, much at the taxpayers' expense. Although favourable publicity may have been achieved, Irving was putting paid to its liability, no more, no less.

[55] Settlement was reached during a meeting at J.D. Irving's offices in St. John on 7 July 2000. Participants on the Irving side included James Kenneth Irving, the Chairman of J.D. Irving, Limited, David Jamieson, Executive Vice-President and Secretary of J.D. Irving, as well as Secretary of Universal Sales and Atlantic Towing, and legal counsel Johanne Gauthier (currently a sitting judge of the Federal Court of Appeal). As so often happens during such without prejudice settlement discussions, no one recalls the precise basis for the $5 million figure. Mr. Irving recalls that he acted on the recommendation of Mr. Jamieson, who is himself a lawyer. Mr. Jamieson recalls the genesis was an offer which was still open when the meeting began. Based on a recommendation by Me Gauthier, the offer which had been open going into the meeting was for $2.5 million in principal and interest, plus costs. If not accepted, the offer was to remain open with interest running on the capital amount compounded semi-annually at the bank prime rate. Me Gauthier certainly did not have the limit of the insurance coverage in mind as she had not been provided with any detail of the policies whatsoever.

[56] The rationale of the $2.5 million offer is set forth in a memo from Me Gauthier to Chris MacDonald, in-house counsel at J.D. Irving, Limited, dated May 23, 2000. As she explained:

> An amount of $2.5 million + costs calculated in accordance with tariff B of the Federal Court Rules up to the date of the acceptance of the offer, i.e. let's say June 30th, 2000.
>
> …
>
> The $2.5 figure is made up of $1,540,000 ± in capital plus $660,000 ± in interest (7% compounded for 5 years/because the first major disbursement was made in the summer of 1995, i.e. $12.8 million to DonJon). The extra $300,000 is added to cover/protect you against the fluctuating rate of the SDR.

[57] During trial, she said she had calculated the $1,540,000 based both on the general and pollution limitation fund for the barge and the normal limitation fund for the tug. She was not cross-examined on the point and so we do not know precisely what calculations she used. The $660,000 in interest was calculated at 7% compounded for 5 years. The additional $300,000 was to act as a hedge against the fluctuating rate of the Special Drawing Right of the International Monetary Fund. The creation of a limitation fund was considered a matter of procedure, and special drawing rights were to be converted into Canadian dollars at the date the fund was established, or ordered to be established. There was a real risk of a falling Canadian dollar.

[58] In her memo, she had roughly estimated the Crown's costs as being somewhere between $350,000 and $500,000. During her testimony at trial, she expressed the view it would have cost the Irving Group another $2 to $3 million to proceed to trial.

[59] Her concern was that under the law at the time the burden of establishing entitlement to limit liability lay with the Irving Group. They had to show that the accident occurred without "the actual fault or privity" of a directing mind of the corporations. The basis of the "actual fault or privity" provisions of the *Canada Shipping Act* was the 1957 Limitation Convention. Although it had been replaced in Canada before the settlement by the 1976 Convention and the 1996 Protocol, as a result of transitional provisions the old law still applied to this case. The jurisprudence was such that it was fairly easy to break limitation (for a discussion, see *Rhône (The) v Peter AB Widener (The),* [1993] 1 SCR 497, 101 DLR (4th) 188 and *Société Telus Communications v Peracomo Inc*, 2011 FC 494, [2011] FCJ No 602 (QL), currently in appeal).

[60] I find that the settlement was reasonable and made in contemplation of the likelihood that one or more of Universal Sales, Limited, J.D. Irving, Limited, and Atlantic Towing Limited would have been found liable in excess of that amount should the matter have gone to trial.

[61] A somewhat problematic issue would have been the award of costs. Although costs usually follow the event, the Court has wide discretion. The Irving Group had made an open offer of $2.5 million plus costs. Under the *Federal Courts Rules* as they were in the year 2000, had that offer been left open through trial, and if judgment were for less than that amount, the Irving Group could have expected to be awarded double costs from the date of the offer. Since in my opinion they would have been found liable in excess of that amount, the offer would only have been relevant if they succeeded in their counterclaim for a declaration of limitation of liability. However, the normal, but not invariable, rule in limitation actions was that the party seeking to limit had to pay the other party's costs, even if successful: see Edward C. Mayers*, Admiralty Law and Practice in Canada*, 1st ed (Toronto: The Carswell Company, Ltd, 1916) at 272-73; and Kenneth C. McGuffie, P. A. Fugeman & P. V. Gray, *British Shipping Laws,* vol 1, *Admiralty Practice* (London: Stevens and Sons, 1964) at paragraph 1224.

[62] In light of this finding, I do not have to consider the proposition advanced by the underwriters that since the settlement reflected both insured and uninsured claims, without a division between the two, the Group is not entitled to any recovery from the underwriters. This proposition is based on the decision of the English Commercial Court in *Lumberman's Mutual Casualty Co v Bovis Land Lease Ltd*, [2004] EWHC 2197, [2005] 1 Lloyd's Rep 494. That case held that as a matter of law an insured who relied on a global settlement had no means of ascertaining that he was under a liability covered by the policy. I do not agree with this reasoning. In

such a case it falls upon the Court, based on the evidence, to make the division. The case is, of course, not binding on me, and, in any event, has fared poorly in England: see *Enterprise Oil Ltd v Strand Insurance Co Ltd*, [2006] EWHC 58, [2007] Lloyd's Rep IR 186, and *Omega Proteins Ltd v Aspen Insurance U.K. Ltd*, [2010] EWHC 2280, [2011] Lloyd's Rep IR 183.

[63] The underwriters also submit that the claim falls outside the coverage. This derives from the concept that nuisance can be, and in my opinion in this case was, a continuing tort. In *Portage la Prairie,* above, the Supreme Court, through Mr. Justice Martland, held that the continuation of a nuisance created a new cause of action. He said at pages 491-92, speaking of a private nuisance:

> I adopt the proposition of law stated in *Salmond on Torts,* 15th ed., at p. 791, as follows:
>
>> When the act of the defendant is a continuing injury, its continuance after the date of the first action is a new cause of action for which a second action can be brought, and so from time to time until the injury is discontinued. An injury is said to be a continuing one so long as it is still in the course of being committed and is not wholly past. Thus the wrong of false imprisonment continues so long as the plaintiff is kept in confinement; a nuisance continues so long as the state of things causing the nuisance is suffered by the defendant to remain upon his land; and a trespass continues so long as the defendant remains present upon the plaintiff's land. In the case of such continuing injury an action may be brought during its continuance, but damages are recoverable only down to the time of their assessment in the action.

[64] It follows, so the underwriters say, that the Crown is claiming for expenses incurred in 1995 and 1996, based on a new cause of action, which did not occur within the time frame of the policies, *i.e.* 1970.

[65] However the policies do not deal with the creation of causes of action, they deal with accidents or occurrences. The accident or occurrence was the sinking of the Irving Whale during the policy year. It does not matter that the damage was only suffered many years later.

[66] Indeed, this is the reason why many recent policies are written on a "claims made" basis rather than on an "occurrence" basis. The rationale was set out by Madam Justice McLachlin, as she then was, in *Reid Crowther & Partners Ltd v Simcoe & Erie General Insurance Co*, [1993] 1 SCR 252 at 262, 263, 147 NR 44. Although "occurrence" liability policies work reasonably well, there are exceptions:

> …But for insureds who are professionals such as doctors, lawyers, engineers, etc., damages can result (or be discovered) many years after a negligent act is committed. This is even more the case for manufacturers and other types of insureds who can cause damages by producing hazardous products or toxic waste. Therefore, for each of these types of insureds, insurers are at risk for an unknown number of claims that may be made many years after the expiry of a particular policy of "occurrence" liability insurance.
>
> Compounding the uncertainty that these "long-tail" risks caused to insurers was the evolving nature of law and science. The potential for future developments such as the increased availability and quality of scientific proof of causation of harm, expanded legal liability (e.g., "superfund" environmental legislation), and changes in the law as to quantum of damages, added to the uncertainty on the part of insurers as to the likely number of claims that would be made against their insureds in the future, as well as the likely amount of damages per claim for which individual insurers would have to provide indemnity.

[67] This is exactly what happened in this case.

DEFENCE COSTS

[68] While on the one hand there was no contractual duty on the part of the underwriters to defend, on the other it was agreed that it was lawful for the insured to sue, labour and defend any claim and that the costs and expenses of minimizing or establishing a liability of the insured, or defending any suit based upon any liability, or alleged liability, as covered by the policies, was to be paid by the underwriters.

[69] Although defence costs are mentioned in the same breath as sue and labouring costs, there is a distinction in that in my opinion the expenses claimed as sue and labouring could not possibly have benefited the underwriters, while the cost of defending, as long as the claim fell under the policy, is recoverable. Since I am of the view that the Irving Group were liable to the Crown, and covered to a contractual limit of $5 million, the issue is whether the defence costs should be apportioned, and if so, how.

[70] The total amount claimed is Canadian $1,691,427.07, US$42,835.78 and 11,165.30 pounds sterling, which I have rounded out to $1,800,000. Of this amount, $1,681,959.67 relates to legal fees. The balance is for transcripts of examinations for discovery and opinions obtained from experts.

[71] The underwriters admit that all these accounts have been paid, but do not admit that the fees were reasonable. However, they have offered no evidence to show that they were unreasonable. They have made a case, however, that some of the expenses were unnecessarily incurred, or should not be attributable to them. Following Mr. Justice Létourneau's lead in *Remo Imports Ltd v Jaguar*

Cars Ltd, 2007 FCA 258, 367 NR 177, at paragraph 20, I am not prepared to act as a ferret and embark on an analysis of lawyers' time sheets which might support the non-admission by the underwriters.

[72] The major item in defence costs is the legal fees and disbursements paid to Ogilvy Renault in the amount of $1,168,242.67. The underwriters submit that the Irving Group agreed to absorb these fees no matter what. I disagree. It came about this way.

[73] When Osler, Hoskin & Harcourt had to withdraw from the record because of a conflict of interest, they recommended Ogilvy Renault, more particularly Yves Fortier, Q.C., an extremely well-known Canadian litigator who had been, among other things, a past-president of the Canadian Bar Association and Canada's Ambassador to the United Nations. The Crown was being extremely aggressive and the Irving Group wanted a "big gun". However, at the time Mr. Fortier was approached, one of his partners, Pierre Côté, had a watching brief on behalf of the underwriters, defendants in this action. Discussions ensued as to whether this potential conflict could be accommodated. Mr. Côté wrote to the underwriters to suggest that it might be advantageous for them to agree that Mr. Fortier defend the interests of the Irving Group. The rationale was that Mr. Fortier was a formidable trial lawyer and Mr. Côté was confident he would defeat the Crown's claim and, as a result, the issue of insurance cover would never come up, particularly as it would have to be agreed that all fees, costs and expenses in defending the Crown's claim would be for Irving's account only. However if the Crown were to succeed, and if Irving were to seek indemnity on the liability issue, they would instruct other counsel, leaving Mr. Côté "and Ogilvy Renault total freedom in ferociously defending the claim against Excess Underwriters…" Naturally, a Chinese or ethical wall would be established.

[74] The lead underwriters agreed. Alan Cairns, who testified at trial, and who at the time was with Equitas, which was dealing with all Lloyd's premium and risk claims for the 1992 and previous years, wrote to say that written confirmation from the Irving Group was needed.

[75] At this point, the Chinese wall had been established. The prime lawyers on the underwriters' side were Pierre Côté and Richard Desgagnés, and on the Irving Group's side Yves Fortier and Johanne Gauthier. Unfortunately, for various reasons, both Mr. Fortier and Mr. Côté were constantly in and out of Ogilvy Renault's Montreal Office, and communications broke down.

[76] On 15 January 1998, Mr. Côté dictated a memorandum to Mr. Fortier setting out, among other things, that the underwriters would be agreeable as long as Ogilvy Renault's fees would be assumed by the Irving Group, to the exclusion of any contribution by them. Mr. Fortier does not specifically recall receiving that memo.

[77] Richard Desgagnés, who signed the memo on Mr. Côté's behalf, recalls following up by later speaking by telephone with Mr. Fortier, who apparently was at an airport somewhere. Mr. Fortier told him all was well. Mr. Fortier has no recollection of that conversation. I find there was such a conversation. Although there has been some controversy over the tendency to prefer the evidence of one who has a positive recollection over one who has a negative one (*Lefeunteum v Beaudoin* (1897), 28 SCR 89, [1897] SCJ No 68 (QL), *World Marine & General Insurance Co v Leger*, [1952] 2 SCR 3, [1951] SCJ No 46 (QL), *Borthwick v Johnson*, [1997] BCJ No 652 (QL)), in this case, there is no contradiction. Mr. Fortier does not deny that the conversation took place. He simply does not recall it. In any event, this particular conversation is not determinative.

[78] A number of conversations took place between Mr. Fortier and David Jamieson. Both are adamant that the Irving Group were never asked to renounce such right as they may have had to seek indemnity under the insurance policies with respect to Ogilvy Renault's fees. Johanne Gauthier, who sat in on one telephone conversation, recalls that fees were mentioned in the sense that Ogilvy Renault wanted to be paid directly by the Irving Group, rather than to have their bills passed on via the brokers to underwriters. On subscription policies, Me Gauthier's experience was that in such event they would be paid in dribs and drabs over a long period of time. Certainly no indemnity waiver was discussed.

[79] I accept this evidence. What is even more telling is that Mr. Jamieson, as requested, did write on 29 January 1998. He confirmed to Mr. Fortier that if Irving's defence was unsuccessful and they sought indemnity from the underwriters, they agreed to waive conflict of interest and would instruct counsel other than Ogilvy Renault, who through Mr. Côté and others at the firm, apart from those working on the Irving matter, could represent the underwriters. He also asked for confirmation that a Chinese or ethical wall had been established. Not a word was said about absorbing legal fees.

[80] This letter was passed on to Mr. Côté, who in turn sent it to underwriters. He said:

> We refer to our recent discussions and to Mr. Roland Birch's letter of January 14, 1995, and attach hereto copy of a letter emanating from Irving confirming that in the event that the Canadian Government's claim is successful and that Irving elects to seek indemnity under the relevant insurance coverage, Ogilvy Renault and Pierre G. Côté will be free to continue to act for the excess insurers and defend Irving's claim vigorously.

The letter was not shown to Mr. Desgagnés. Neither Mr. Côté nor the underwriters ever came back to complain that Irving had not expressly agreed to one of the conditions they had imposed. They have only themselves to blame. The Irving Group did not waive such right as they might have to claim Ogilvy Renault's fees and disbursements as defence costs under the policies.

[81] There should be some minor adjustments on the legal fees and other expenses. There was some overlap when Ogilvy Renault took over the file. None of the defence costs have been claimed against the primary underwriters, the P&I Club, with its $200,000 limit. However, I take solace in the words of Lord Justice Winn in *Doyle v Olby (Ironmongers) Ltd*, [1969] EWCA Civ 2, [1969] 2 All ER 119 at page 124:

> I think myself with confidence that there is already sufficient evidentiary material available to enable this court to make a jury assessment in round figures. It would be wrong and indeed an intolerable expenditure of judicial time and money of the parties to embark on any detailed consideration of isolated items in the account on which a balance must be struck.

Roughly speaking, I consider it appropriate that $50,000 be deducted from the defence costs, and so fix that figure at $1,750,000.

[82] The more vexing issue is that the Irving Group were defending an action for more than $42 million. Is it reasonable that the underwriters bear the entire cost thereof? The parties have not provided me with a case precisely on point. I am of the opinion that a division should be made, and it matters not whether it is based on an analogy to underinsurance or to defence of both insured and uninsured claims, the excess over $5 million being uninsured. The decision of the English Court of Appeal in *Royal Boskalis Westminster NV v Mountain*, [1997] EWCA Civ 1140, [1997] 2 All ER 929, is instructive. The plaintiffs were operating a dredging fleet in Iraq. Their assets were seized

following Iraq's invasion of Kuwait. At a time when there was danger both to their personnel and their fleet, they negotiated, under duress, a single price for the safety of both. They had property cover. In first instance, Mr. Justice Rix, while noting that it was impossible to put a financial value on the safety of the personnel, apportioned an equal amount to the insured and uninsured interests. His decision was reversed in appeal because, since no price could be put on the lives of personnel, the full cost of entering into the agreement should have been recovered as sue and labour. In this case, safety of life is not at issue, only the allocation of money.

[83] As stated earlier in these reasons, in my opinion the Crown would not have succeeded in its action for the costs it incurred in 1995. This left a claim of about $24 million. The quantum has not been analyzed in this action. If there were skeletons in the Irving Group's closet, *i.e.* the risk of actual fault or privity, I assume there were some skeletons in the Crown's as well. It was refusing to produce some documents, relying on section 39 of the *Canada Evidence Act* (confidences of the Privy Council), and had waited 25 years before taking full remedial action.

[84] Somewhat arbitrarily, I fix the claim at $20 million for defence purposes. It follows that the underwriters should pay 25%, and the Irving Group absorb 75%. On that basis, allowing a little liberty with exchange rates, I fix the underwriters' liability for defence cost at $437,500 (25% of $1,750,000). It would have been helpful to the Court to have had the opinion of an average adjuster. These professionals deal on a daily basis with such matters as losses spread over several years and several policies, general average, particular average, particular charges, deductibles, sue and labour, underinsurance, excess insurance, double insurance, and reinsurance. In the *Pointe Levy*, above, seven average adjustors testified. In this case, however, as Mr. Jamieson testified, no adjustment was done.

[85] In summation, the principal amount of the liability of the excess underwriters to Universal Sales, Limited, Atlantic Towing Limited and J.D. Irving, Limited is $4,946,001.86 ($4,508,501.86 in principal plus $437,500 in defence costs), on a several, but not joint, basis.

[86] The liability of the companies which did not defend is as follows:

Companies	**Percentage**
Orion Insurance Co. Ltd.	3.49
English & American Ins. Co. Ltd.	2.055
Andrew Weir Ins. Co. Ltd.	2.05
TOTAL	**7.595**

In other words: 7.595% of $4,946,001.86, or $375,648.84.

[87] The liability of the defending underwriters is as follows:

<table>
<tr><th colspan="2">Companies</th><th>Percentage</th></tr>
<tr><td colspan="2">Edinburgh Assurance Co. Ltd.</td><td>6.57</td></tr>
<tr><td colspan="2">British Law Insurance Co. Ltd.</td><td>2.67</td></tr>
<tr><td colspan="2">Economic Insurance Co. Ltd.</td><td>2.055</td></tr>
<tr><td colspan="2">Insurance Co. of North America</td><td>1.54</td></tr>
<tr><td colspan="2">London & Edinburgh General Ins. Co. Ltd.</td><td>0.62</td></tr>
<tr><td>Ocean Marine Ins. Co. Ltd.</td><td>33 1/3 % of</td><td rowspan="3">3.08</td></tr>
<tr><td>Royal Exchange Assurance</td><td>33 1/3% of</td></tr>
<tr><td>Sun Insurance Office Ltd.</td><td>33 1/3% of</td></tr>
<tr><td>Sphere Insurance Co. Ltd.</td><td>60% of</td><td rowspan="2">2.46</td></tr>
<tr><td>Drake Insurance Co. Ltd.</td><td>40% of</td></tr>
<tr><td colspan="2">Eagle Star Insurance Co. Ltd.</td><td>2.05</td></tr>
<tr><td colspan="2">Subtotal – Companies</td><td>21.045%</td></tr>
</table>

Lloyd's Syndicate No.	Percentage	Lloyd's Syndicate No.	Percentage
615	15.40	573	1.13
616	1.03	128	3.08
617	4.52	368	2.05
277	9.85	483	0.82
418	9.45	274	0.62
65	4.11	590	0.41
108	0.62	299	3.08
764	2.05	206	3.08
720	1.24	632	0.74
335	0.82	633	0.90
406	5.54	114	0.82
		Subtotal – Lloyd's Syndicates	**71.36%**

In other words: the defendants who appeared are liable for 92.405% (21.045% plus 71.36%) of $4,946.001.86, or $4,570,353.02.

<u>INTEREST AND COSTS</u>

[88] The parties have asked that a decision on interest and the costs of this action be deferred until after the issuance of these reasons. So it shall be. The action was instituted in 2001. The Court will need to know why it took 11 years to get to trial.

"Sean Harrington"
Judge

Montreal, Quebec
April 12, 2012

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1148-01
STYLE OF CAUSE:	UNIVERSAL SALES, LIMITED *ET AL* v EDINBURGH ASSURANCE CO. LTD *ET AL.*
PLACE OF HEARING:	MONTREAL, QUEBEC
DATES OF HEARING:	FEBRUARY 20-24 AND FEBRUARY 27-29, 2012
REASONS FOR JUDGMENT:	HARRINGTON J.
DATED:	APRIL 12, 2012

APPEARANCES:

John MacDonald Mary Paterson	FOR THE PLAINTIFFS
Peter Cullen Matthew Liben	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

Osler, Hoskin & Harcourt LLP Barristers & Solicitors Toronto, Ontario	FOR THE PLAINTIFFS
Stikeman Elliott LLP Barristers & Solicitors Montreal, Quebec	FOR THE DEFENDANTS