

Federal Court
of Appeal



CANADA

Cour d'appel
fédérale

Date: 20090619

Docket: 09-A-14

Citation: 2009 FCA 209

Present: PELLETIER J.A.

BETWEEN:

HODDER TUGBOAT CO. LTD.

Plaintiff

and

**JJM CONSTRUCTION LTD., TEXADA QUARRYING LTD.,
PACIFIC TOWING SERVICES LTD., Owners and All Others Interested in
The Ship, The "PACIFIC MARINER II"**

Defendants

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on June 19, 2009.

REASONS FOR ORDER BY:

PELLETIER J.A.

Federal Court
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Defendants

REASONS FOR ORDER

PELLETIER J.A.

[1] On or before September 8, 2006, Hodder Tugboat Co. Ltd. (Hodder) entered into charter agreements by which JJM Construction Ltd. (JJM) chartered two barges, NA 194 and NA 195, from Hodder on the terms and conditions set out in the charter agreements.

[2] While the barges were in JJM's service, they were loaded with a cargo of rock by Texada Quarrying Ltd. (Texada) and were towed from Texada's loading facility to JJM's construction site at False Creek in Vancouver by the vessel "Pacific Mariner II" owned by Pacific Towing Service

Ltd. (Pacific). Unfortunately for all concerned, one barge capsized en route and the other ran aground, sank and rolled in False Creek.

[3] Both barges were insured under a hull and machinery policy of insurance, as well as protection and indemnity insurance, taken out by JJM in which Hodder was also named as an insured.

[4] The insurer made certain payments under the hull and machinery policy to Hodder and received from Hodder an executed Subrogation Receipt and Release. It appears that Hodder has losses for which it was not indemnified by the insurer.

[5] Exercising its right of subrogation, Hodder's insurer, Navigator's Insurance (Navigator), instructed its solicitors to commence a subrogated action in the name of Hodder and JJM against Texada, Pacific and all others interested in the ship Pacific Mariner II. That action is action T-1908-07 (the 07 action). Subsequently, Hodder, using its own solicitors, commenced its own action against JJM, Texada, Pacific and all others interested in the ship Pacific Mariner II. This action is action T-1656-08 (the 08 action).

[6] Confronted by two actions containing essentially the same allegations of tortious conduct, Texada and Pacific brought motions to strike the claim against them in the 08 action on the grounds that the pleadings were scandalous, frivolous or vexatious or were otherwise an abuse of process, given the existence of the same allegations against them in the earlier 07 action. Counsel for the

insurers asked for and were granted leave to appear at the hearing of the motion. The motions judge disposed of the motion by making the following order:

- 1- Counsel for Hodder in the 08 action and counsel for the plaintiffs in the 07 action co-operate to achieve the restructuring of the two actions in such a manner that the plaintiff in the 07 action becomes JJM pursuing its subrogated and uninsured claims and the defendants remain Pacific and Texada, and the Plaintiff in the 08 action remain Hodder pursuing both the subrogated and the uninsured claims against JJM, Pacific and Texada.
- 2- Both the 07 and the 08 actions shall continue as a specially managed proceeding.
- 3- The 07 and the 08 actions shall be heard together, but not consolidated.
- 4- JJM in the 08 action has leave of the Court to issue third party notices to Pacific and Texada.
- 5- A copy of this order shall be placed in Court file T-1908-07.
- 6- Upon the performance of steps 1 to 4 above, the motions by Texada and by Pacific to strike the defendants in the 08 action are dismissed without costs.

[7] Counsel instructed by Navigator sought an order in the Federal Court granting it standing to appeal the decision. I presume that this was done because counsel instructed by Navigator viewed their client as an intervenor in the motion before the Federal Court and as such it would not have a right of appeal unless that right was granted to it by the Federal Court. At the same time, counsel sought from the Federal Court an extension of time to file their notice of appeal.

[8] The difficulty in all of this is that Navigator is not a party to the proceedings. It simply stands in the shoes of its insureds Hodder and JJM, who are already parties to the 07 action. Thus, the Court is faced with an application by Hodder and JJM to be granted intervenor status so as to appeal a decision in which they are parties. It is obvious that Navigator's interests, as a subrogating insurer, are not necessarily identical to those of its insureds, particularly when:

- a) one of the named insureds has suffered losses for which Navigator has not indemnified it; and
- b) that insured seeks to recover those losses from the other named insured, who is insured against legal liability by Navigator.

[9] I am not called upon to decide the propriety of the way in which the various parties have positioned themselves in this dispute. I am however asked to treat Hodder and JJM as represented by counsel instructed by Navigator as different legal entities than Hodder and JJM as represented by counsel of their choice. I suspect that a good deal of the law of subrogation stands against that proposition. That said, the Federal Court has allowed it and the question is whether they should be allowed to appeal an order made following a hearing at which they were given the right to be heard and which, on the face of it, affects their interests.

[10] For the purposes of this appeal only, it seems to me that Navigator should be allowed to speak in its own name rather than in the name of its insureds. To hold otherwise is to create a style of cause which will be confusing to all. The question of intervener status ought to have been dealt with by the Federal Court but given that this question is now before this Court, I see no advantage in

sending the matter back to the Federal Court for a decision on that issue. I will grant Navigator Insurance, in its own name, intervenor status with the right to appeal the decision of the Federal Court. The time for filing a notice of appeal from the decision of the Federal Court is extended, for all parties, to the day that is 15 days after the issuance of this order. Given that none of this procedural complexity can be attributed to Texada and Pacific, they are entitled to the costs of this motion in any event of the cause.

"J.D. Denis Pelletier"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:

09-A-14

STYLE OF CAUSE:

*Hodder Tugboat Co. Ltd. and JJM
Construction Ltd., Texada Quarrying
Ltd. et al*

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:

PELLETIER J.A.

DATED:

June 19, 2009

WRITTEN REPRESENTATIONS BY:

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