

Federal Court  
of Appeal



Cour d'appel  
fédérale

Date: 20111130

Docket: A-42-11

Citation: 2011 FCA 334

**CORAM:** NOËL J.A.  
PELLETIER J.A.  
TRUDEL J.A.

**BETWEEN:**

**CALOGERAS & MASTER SUPPLIES INC.**

**Appellant**

**and**

**CERES HELLENIC SHIPPING ENTERPRISES LTD. and  
THE OWNERS AND ALL OTHER INTERESTED IN  
THE SHIP "CAP LAURENT " and THE SHIP "CAP LAURENT"  
and THE OWNERS AND ALL OTHERS INTERESTED  
IN THE SHIP "CAP ROMUALD" and THE SHIP "CAP ROMUALD"  
and THE OWNERS AND ALL OTHERS INTERESTED IN  
THE SHIP "CAP GEORGES" and THE SHIP "CAP GEORGES"  
and OWNERS AND ALL OTHERS INTERESTED  
IN THE SHIP "CAP LEON" and THE SHIP "CAP LEON"  
and ALL OWNERS AND OTHERS INTERESTED  
IN THE SHIP "CAP JEAN" and THE SHIP "CAP JEAN"  
and THE OWNERS AND ALL OTHERS INTERESTED  
IN THE SHIP "CAP DIAMANT" and THE SHIP "CAP DIAMANT"  
and THE OWNERS AND ALL OTHERS INTERESTED  
IN THE SHIP "CAP PIERRE" and THE SHIP "CAP PIERRE"**

**Respondents**

Heard at Montréal, Quebec, on November 30, 2011.

Judgment delivered from the Bench at Montréal, Quebec, on November 30, 2011.

REASONS FOR JUDGMENT OF THE COURT BY:

PELLETIER J.A.

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IN THE SHIP "CAP DIAMANT" and THE SHIP "CAP DIAMANT"  
and THE OWNERS AND ALL OTHERS INTERESTED  
IN THE SHIP "CAP PIERRE" and THE SHIP "CAP PIERRE"**

**Respondents**

**REASONS FOR JUDGMENT OF THE COURT**  
**(Delivered from the Bench at Montréal, Quebec, on November 30, 2011)**

**PELLETIER J.A.**

[1] This is an appeal from the decision of Madam Justice Gauthier in an action for the price of goods sold and delivered. In a decision reported as *Calogeras & Master Supplies Inc. v. Ceres Hellenic Shipping Enterprises Ltd et al.*, 2010 FC 1318, the trial judge granted the appellant judgment for an amount equal to approximately 1/10 of its original demand plus pre- and post-judgment interest at a rate of 5% from March 1, 2010, the date at which the invoices which evidenced the amount owing were filed as exhibits in the trial. The appellant appeals from the trial judge's conclusion with respect to interest, arguing that she erred in not awarding interest at the rate and for the period provided in the appellant's General Terms and Conditions.

[2] The trial judge concluded that the appellant waived its right to interest on the amounts owing to it from time to time. This is a finding of fact which the trial judge was entitled to make on the basis of the record before her. Although counsel for the appellant correctly stated that a waiver must be unambiguous, the trial judge did not consider that the evidence gave rise to an ambiguity, a conclusion which was open to her in light of the whole of the evidence.

[3] The trial judge made adverse findings of credibility against the appellant's witnesses and made findings of fact based on those credibility findings. The standard of review in such cases is that of palpable and overriding error, a burden which the appellant has been unable to discharge.

[4] In awarding pre- and post-judgement interest on the amount which the respondent admitted it owed to the appellant, the trial judge did not explain why she limited the payment of interest from the date of filing of certain invoices as exhibits at the trial. In the absence of an explanation, it is not possible for us to determine if the judge exercised her discretion according to settled principles. Having decided to award interest, we are unable to determine why the judge did not award it from a date computed by reference to the date of the invoices.

[5] To the extent that the issue of prescription was raised, it is not a factor in this case in light of the evidence of the respondent's waiver by its witness Lagonikas.

[6] Exercising our discretion, we would allow the appeal in part and order that interest at 5% be paid from a date 60 days after the date of issuance of each invoice which the respondent admitted was unpaid.

[7] Given the circumstances, each party should bear its own costs of the appeal.

“J.D. Denis Pelletier”

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-42-11

**(APPEAL FROM A DECISION OF THE FEDERAL COURT DATED DECEMBER 22, 2010, DOCKET NO. T-1478-05)**

**STYLE OF CAUSE:** CALOGERAS & MASTER  
SUPPLIES INC. and  
CERES HELLENIC SHIPPING  
ENTERPRISES LTD. ET AL.

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** November 30, 2011

**REASONS FOR JUDGMENT OF THE COURT BY:** NOEL, PELLETIER,  
TRUDEL JJA.

**DELIVERED FROM THE BENCH BY:** PELLETIER J.A.

**APPEARANCES:**

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FOR THE RESPONDENTS

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FOR THE RESPONDENTS