Citation: *The City of Whitehorse v. Byers Transportation*, 2003 YKSM 2

Date: 20031212
Docket: 03-S0050
Registry: Whitehorse

IN THE SMALL CLAIMS COURT OF YUKON
Before: His Honour Judge Faulkner

The City of Whitehorse

Plaintiff

v.

Byers Transportation System Inc.

Defendant

Appearances:
Jane Wiebe — Appearing on behalf of the Plaintiff
Ian MacPherson — Appearing on behalf of the Defendant

REASONS FOR JUDGMENT

[1] On August 31, 1999, Tim Arnholz, who is the Aquatic Supervisor at the City of Whitehorse swimming pool, had a swimming pool pump that needed repair. Mr. Arnholz took it to the defendant, Byers Transportation System Inc., and arranged to ship the pump by truck to the pump manufacturer, Commercial Aquatics, in North Vancouver, B.C. Mr. Arnholz signed a "Straight Bill of Lading" showing the City of Whitehorse as the shipper and Commercial Aquatics as the Consignee. Mr. Arnholz signed the box at the bottom of the form designated for the "Shipper". The article shipped is described as a "BX" or box and the weight is shown as 26 pounds.

[2] Toward the bottom of the pre-printed bill of lading form, though not immediately adjacent to where Mr. Arnholz signed, is the following:

> DECLARED VALUE. Maximum liability of carrier is $2.00 per lb. ($4.41 per kilogram) unless declared value states otherwise. Valuation declared in excess of $2.00 per lb. will result in excess valuation charge as published in BTS – 1 Tariff.

[3] A clause similar to this is standard in the trucking industry and probably appears on most, if not all standard bills of lading used by trucking companies in the Yukon.

[4] In the case of the bill of lading used by the defendant Byers Transportation System Inc., the limitation clause is set out in very fine print. The four lines of print are .63 cm. (¼ of an inch) in height -- including the spaces between the lines. There is a space with a dollar sign (“$”) to the right of this wording where a higher declared value could be written in.

[5] The shipping charges were prepaid. The pump was lost in transit and the City of Whitehorse claimed from Byers Transportation System Inc. $903.29, which was the cost of a replacement. Byers Transportation System Inc. declined to make good the loss except to the extent of its admitted liability under the bill of lading, being the sum of $2.00 per pound or $52.00.

[6] Byers Transportation System Inc. was a bailee of the goods for reward and, in ordinary circumstances, they would be liable unless they could show that the loss did not occur owing to negligence on their part. Since Byers Transportation System Inc. has no idea how the pump was lost, they cannot establish due care. The issue in this case is whether or not the limitation of liability clause in the bill of lading is effective to limit their liability to the $2.00 per pound specified in the contract of carriage.

[7] I should mention at the outset that the law generally subjects clauses seeking to disclaim all liability to greater scrutiny than those intended only to limit liability. However, while in theory the clause contained in the bill of lading in this

case is a limitation of liability, in many cases it amounts to a virtually complete disclaimer since the sum of $2.00 per pound is, today, a very trifling amount in relation to the actual value of goods shipped -- apart perhaps from bags of coal or some such. In this case, for example, the admitted liability of $2.00 per pound amounts to roughly six percent of the value of the article lost.

[8] It was argued by the City of Whitehorse that Byers Transportation System Inc. could not claim the benefit of the limitation clause where there has been a fundamental breach of the contract of carriage. Indeed, there have been a number of cases involving loss of articles shipped by common carrier that have held that where the goods are lost there has been a fundamental breach of the contract of carriage. See *Bontex Knitting Works Ltd. v. St. John's Garage*, [1943] 2 All E.R. 690*; Williams & Wilson Ltd. v. OK Parking Stations Ltd.* (1970), 17 D.L.R. (3d) 243*; Alexander v. Railway Executive,* [1951] 2 All E.R. 442*, Firchuk et al v. Waterfront Investments & Cartage Ltd.,* [1970] 1. O.R. 327.

[9] However, modern jurisprudence holds that contracts may include limitation or exclusion clauses that will survive a fundamental breach, provided both parties contemplated such a breach and intended, nevertheless, to be bound by the clause. *Syncrude Canada Ltd. v. Hunter Engineering Co*., [1989] 1 S.C.R. 426; *Beaufort Realties (1964) Inc. v. Belcourt Construction (Ottawa) Ltd.,* [1980] 2 S.C.R. 718.

[10] The loss of the articles shipped is clearly contemplated by the limitation clause in the defendant's bill of lading. The question is whether or not the plaintiff was aware of the limitation clause and intended to be bound by it.

[11] In this case, the bill of lading was completed by a Byers Transportation System Inc. employee and simply signed by Mr. Arnholz. Mr. Arnholz says he was not aware of this limitation of liability and that the Byers Transportation System Inc.'s employee did not bring it to his attention. Byers Transportation

System Inc. admits that the limitation was not pointed out to Mr. Arnholz and says it is not their practice to do so.

[12] In my view, this omission is fatal to the defendant's claim of reliance on the limitation clause in this case. It is true that this limitation clause is more or less standard in the industry, however, Mr. Arnholz was not a person who normally dealt with shipping and cannot be taken to be aware of the customs or usage of the trade. Nor was the limitation clause afforded sufficient prominence on the bill of lading for the Court to conclude that Mr. Arnholz must have seen it or, alternatively, that a reasonable effort had been made to bring it to his attention.

[13] The importance of notice may be illustrated by reference to three Canadian court decisions that have dealt with cases where a common carrier sought to rely on a limitation clause in a standard bill of lading.

[14] *In Mackay v. Scott Packing and Warehousing Co. (Canada),* [1994] F.C.J. No. 457 (T.D.), the carrier had failed to deliver a number of valuable antiques consigned to it for shipment by the plaintiff. The plaintiff was an experienced professional who was familiar with standard form shipping contracts containing limitation clauses. Moreover, he had had the contract in his possession for a week before signing it. The court held that, despite the failure of the carrier to fulfill its obligations, it was able to rely on the limitation clause.

[15] The court in *Peter Cortesis Jeweller Ltd. v. Purolator Courier Ltd.* (1981), 35 O.R. (2d) 39 (Cty. Ct.), also upheld the validity of a limitation clause where the carrier had failed to deliver the goods. The limitation clause was contained on the back of the bill of lading. On the face of the bill were the words "IMPORTANT. READ CONDITIONS ON BACK." Below these words in a box with black background and white lettering, the limitation was repeated. The court held that the document was sufficient to bring the limitation to the notice of the consignor

and that both parties contemplated such a limitation. As a result, the shipper could only recover the $2.00 per pound stipulated by the limitation clause.

[16] However, a different result occurred in *Aurora TV and Radio Ltd. v. Gelco Express Ltd*., [1990] M.J. No. 243 (Man. Q.B.). This case again dealt with a carrier who had failed to deliver consigned goods and was attempting to rely on a limitation clause in its standard bill of lading. On the face of the bill was a statement saying “Maximum liability of $4.41 per kilogram computed on the total weight of the shipment unless declared valuations states otherwise.” At the bottom of the page were the words “TERMS AND CONDITIONS ON THE REVERSE SIDE.” The reverse side contained a limitation clause which was couched in somewhat confusing terms. The court found that an employee of the carrier had completed the face of the bill, which was then initialled by the plaintiff’s employee. The court also found that the carrier’s employee had not brought the terms and conditions of the bill of lading to the attention of the plaintiff’s employee, nor had the plaintiff’s employee reviewed the terms. The court (following *Firchuk*, *supra*) held that before the limitation clause could be relied upon, the other party must be given reasonable notice of the clause. The decision in *Aurora, supra,* was upheld on appeal to the Manitoba Court of Appeal: [1991] 4 W.W.R. 525.

[17] There is one final issue to be discussed. In many cases, trucking tariffs, bill of lading requirements and conditions of carriage are set by provincial or federal authorities established for the purpose of regulating the trucking industry. These authorities may, and often do, approve limitations of liability for common carriers which are to be set out in standard bills of lading. Where these orders have the force of law, it could be argued that such regulations serve to govern common carrier liability irrespective of the agreement between the consignor and the carrier. In this regard, the defendant Byers Transportation System Inc. referred to an order of the Motor Carrier Commission of British Columbia made in 1980. This order provides that a bill of lading shall state “in a conspicuous form”

any limitations to the carrier's liability and shall contain or incorporate by reference certain "specified conditions of carriage." One of the specified conditions is a limitation on the liability of the carrier to $2.00 per lb. of goods shipped unless a higher value is declared.

[18] Whatever the legal implications of this order may be elsewhere, it could not affect a contract entered into in the Yukon. *The Motor Transport Act R.S.Y.T.* 2002 c. 152, governs the trucking and bus service industry in the Territory. However, that *Act,* and the Regulations passed under it, do not deal with tariffs or conditions of carriage. Moreover, the Manitoba Court of Appeal in *Aurora TV and Radio Ltd. v. Gelco Express Ltd, supra,* found that similar regulations in Manitoba could not change the substantive law of contract, since to do so would be beyond the power of the regulation in question.

[19] In the result, I find that the defendant cannot rely on the limitation clause contained in the bill of lading and is therefore liable for the cost of the goods lost. The plaintiff will have judgment for the sum of $903.29. The plaintiff is also entitled to its costs as provided for in s. 74 of the *Small Claims Court Regulations Yukon* O.I.C. 1995/152.

Faulkner T.C.J.