
CANADA / JUDGMENT

0813054 B.C. Ltd. v. Overland West Freight Lines Ltd.

2013 BCSC 2367

COURT

Supreme Court of British Columbia

DECIDED

29 November 2013

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

0813054 B.C. Ltd. v. Overland West Freight Lines Ltd.,

2013 BCSC 2367

Date: 20131129

Docket: S103468

Registry: Vancouver

Between:

0813054 B.C. Ltd.

Plaintiff

And

Overland West Freight Lines Ltd.,

and Mandala Custom Homes Inc.

Defendants

Before: The Honourable Madam Justice Adair

Oral Reasons for Judgment

Counsel for the Plaintiff:

J.P. Scouten

Counsel for the Defendant Overland West Freight Lines Ltd.:

H.D. Edinger

Counsel for the Defendant Mandala Custom Homes Inc.:

C.R.J. Cook

Place and Date of Hearing:

Vancouver, B.C.

November 18 and 19, 2013

Place and Date of Judgment:

Vancouver, B.C.

November 29, 2013

- [1] THE COURT: This is a claim for damages arising out of the loss in transit on April 7, 2010 of component parts of a prefabricated commercial building that was being transported by the defendant Overland from Nelson to Fort Nelson. The building had been purchased by the plaintiff from the defendant Mandala.
- [2] There is no dispute that the value of the building components destroyed in the accident is \$117,640.59 including taxes.
- [3] Both the plaintiff and the defendant Overland apply for judgment on a summary trial.
- [4] The plaintiff seeks judgment against Overland for the value of the goods lost (\$117,640.59). It also seeks consequential damages in the sum of \$42,768.70. The plaintiff abandoned its claim for loss of profits.
- [5] Overland says that its liability is limited to \$2 per pound actual weight of the goods lost, pursuant to the terms of a bill of lading dated April 6, 2010. It seeks a declaration in that regard and a declaration concerning the actual weight of the goods.
- [6] The defendant Mandala, who designed and manufactured the building components and who was involved in filling out the bill of lading, supports the plaintiff's application.
- [7] All parties agree that, despite some imperfections and conflicts in the evidence, and although a slice (at least) of the litigation would remain, the issues on the applications are suitable for determination on a summary trial, and, particularly in the light of the amount involved, the parties wish to have those issues determined now.
- [8] I agree that, in the circumstances, the issues can be determined on a summary trial and that it would not be unjust to decide the issues raised on the applications.
- [9] The issues are:

- (a) whether the bill of lading is enforceable by Overland to limit its liability?
 - (b) if the bill of lading is enforceable, what is the weight of the goods lost?
 - (c) if the bill of lading is not enforceable, what damages are recoverable by the plaintiff, and, in particular, are consequential damages recoverable?
- [10] The background facts are, for the most part, straightforward.
- [11] The plaintiff owns and operates a retail store in Fort Nelson under the name "Down to Earth Health Shop." The store sells health food products and ecologically responsible goods such as clothing, housewares, cosmetics and purified water. The plaintiff also operates a café in the store. The plaintiff's principals are Kevin Friesen and Kymberley Gillett, his wife.
- [12] Prior to mid-2010, the plaintiff's business was operated out of leased premises. In 2009, the plaintiff made plans to expand the business to a larger facility and purchased property on 51st Avenue in Fort Nelson, intending to build a new commercial premises there. The plan was to construct the new premises in two phases. Phase 1 was going to consist of a new commercial building to serve as the retail shop and café, and phase 2 was going to be a second building to be built later and connected to the first.
- [13] The plaintiff retained Mandala to custom design and build a prefabricated building for phase 1.
- [14] The plaintiff's plan was to complete the building in time for the new premises to be opened to the public by July 1, 2010. The plan was then to give Mandala the go-ahead to construct the phase 2 building so that it could be completed and open to the public by December 1, 2010. None of these plans was communicated to Overland.
- [15] Although not required to do so, as a courtesy to customers, Mandala sometimes assisted customers with making shipping arrangements. It did so for the plaintiff by contacting Overland.
- [16] Mandala does not have scales capable of weighing materials of the size of the parts of the building. The weight of the materials is not something that is important for Mandala's business. According to Jenny Henri, Mandala's office manager, the expectation is that the trucking company will weigh the load as required, and Mandala is not really interested in getting involved in shipping. Ms. Henri explained that if Mandala is helping to arrange shipping for a customer, Mandala will usually do a "guesstimate" (her word) of the weight, and usually "guesstimates" 40,000 to 50,000 pounds for a 48 to 53 foot flatbed truck.
- [17] On March 22, 2010, Ms. Henri contacted Overland by email requesting a quote for a shipment of a 53 foot trailer load from Nelson (the original email said to Fort St. John, but that is a mistake and nothing turns on it) to Fort Nelson. Ms. Henri estimated the weight as 50,000 pounds and stated that the load would be "prefabricated components for a commercial building." She also indicated that there would be two loads.

- [18] Ms. Henri and Mr. Len Rubner (Overland's Castlegar Terminal manager) exchanged further email messages on March 30 and 31. Mr. Rubner inquired whether the loads were "for sure" 50,000 pounds, and asked whether they needed tarping. Ms. Henri responded that "50,000 is a guess - we're shipping a prefabricated commercial building." She also confirmed the load would require tarping.
- [19] Arrangements were made between Ms. Henri and Mr. Rubner for Overland to collect the first load on April 6, 2010. Mandala informed Mr. Friesen and Ms. Gillett of the arrangements that had been made, that Mandala would be loading the first shipment on April 6, and that the shipment would be driven to Fort Nelson the following day.
- [20] The loading process typically takes seven to eight hours for a standard home package, and Mandala typically requests that trucks doing the shipping arrive early in the morning. Unfortunately, Overland's truck did not arrive at Mandala until the afternoon on April 6, and, generally speaking, the loading of the shipment did not go smoothly, at least from Mandala's perspective.
- [21] Mr. Darrol Gallagher is the Overland driver who picked up the shipment on April 6 at Mandala. He has provided an affidavit describing the events as he recalled them. He could not recall whether he provided a blank bill of lading to Mandala or whether they already had one, but he said if Mandala did not have one, he would have provided one. He described his observations of the loading and arrangements that were made to tarp the load. He said that after he and a colleague finished tarping the shipment, he left the loading area and went into the Mandala offices. According to Mr. Gallagher, he there "met with" Mr. Chris Armstrong of Mandala and "obtained what appeared to be a completed bill of lading and building plans" for the shipment. He said that "on receiving the bill of lading," he detached and returned a carbon copy to Mr. Armstrong and then drove the shipment to Overland's Castlegar terminal.
- [22] In his evidence, Mr. Armstrong on the other hand described circumstances that started off badly by the late arrival of the Overland truck and deteriorated into frustration, impatience and acrimony. According to Mr. Armstrong, at one point Mr. Gallagher gave him a form to fill out, something that Mr. Armstrong never did because typically such matters were dealt with by Ms. Henri or the office staff. However, by this time, they were no longer around. Mr. Armstrong called asking Mr. Gallagher about the form and what needed to be on it. According to Mr. Armstrong, he and Mr. Gallagher argued over whether the load was going to be tarped, and resolving the tarping issue created more delay, frustration and irritation.
- [23] Mr. Armstrong had filled in some of the information on the bill of lading and signed it. He then left it on his desk and went to see what else could be loaded on to the truck. He felt that he could not complete the form until the truck was fully loaded. It was then well into the evening. Mr. Armstrong and Mr. Gallagher continued to argue about tarping.

- [24] Mr. Armstrong says that he and Mr. Gallagher had a conversation in Mr. Armstrong's office, and by this point Mr. Gallagher was (according to Mr. Armstrong) very angry and exasperated. Mr. Armstrong describes Mr. Gallagher as grabbing the bill of lading off Mr. Armstrong's desk, ripping out a copy, which he threw at Mr. Armstrong, and storming out. As far as Mr. Armstrong was concerned, the document was incomplete. In particular he had not completed the description of the goods and nothing had been filled in in the weight column.
- [25] The accident in which the goods were lost occurred on April 7, 2010.
- [26] There is no dispute that after Mr. Gallagher left Mandala with the bill of lading taken from Mr. Armstrong, and after the accident on April 7, 2010, Mr. Rubner added some information to the bill of lading. The circumstances are described in Mr. Meehan's affidavit (at paras. 27 and following, and Mr. Rubner confirms the facts stated there are true. Specifically, Mr. Rubner wrote the words "Pre-fab Warehouse" and inserted a weight in the column "weight subject to confirmation." Mr. Rubner initially inserted a weight of 40,000 pounds, essentially what is referred to in the evidence as a "cube weight." However, that weight was "whited-out" and a weight of 20,000 pounds was inserted instead.
- [27] After the accident, Overland made arrangements to collect the entirety of the shipment from the accident site. The components were then weighed at the Castlegar Terminal in a process described by Mr. Meehan and confirmed by Mr. Rubner (who was directly involved). Essentially, Mr. Rubner and a colleague weighed one unit of each item recovered, and then multiplied that weight by the total number of that particular unit that Mandala said was in the shipment. As a result of this process, Overland concluded that the total weight was 18,826 pounds.
- [28] In August 2010, Mandala shipped a replacement shipment to the plaintiff, through another carrier. There is no actual weight of that shipment. However, there is a cube weight estimated on the bill of lading. There is also a declared value noted on the bill of lading. The fact that the bill of lading contains a declared value means that the actual weight is less important because the carrier's liability will be based on the declared value, not weight.
- [29] Even though Overland took concrete steps to obtain a reliable weight of the goods lost, Overland's evidence concerning the actual weight is not without problems. Based on Overland's evidence, the wall sections in total weigh the most. However, only one wall section out of 44 was actually weighed. The wall sections were not uniform in size, and, in the evidence, Overland does not identify which wall section was in fact weighed or explain how the wall section that was weighed was picked.

[30] On the other hand, neither the plaintiff nor Mandala ever weighed the components of the shipments (either the original or the replacement shipments) at any time. At best, Mandala's witnesses have expressed opinions and conclusions about weight, based on unknown or flimsy foundations, or based on statements in documents that are not admissible for their truth. Some of the problems are illustrated in Ms. Henri's affidavit.

[31] I turn then to a discussion of the issues.

[32] The first issue is whether Overland can rely on the terms of the bill of lading to limit its liability.

[33] Both the plaintiff and Overland rely on s. 37.39(1) of Motor Vehicle Act Regulations, B.C. Reg. 26/58, which provides in relevant part that:

37.39 (1) Subject to this Part, if freight is accepted for shipment by or on behalf of a carrier who operates a business vehicle within the meaning of section 237 (a) or (c) of the Act, the carrier must, at the time of that acceptance, issue or cause to be issued a bill of lading in accordance with the following requirements:

(a) a bill of lading issued under this subsection must show the following:

(i) the name and address of the consignor (shipper);

(ii) the date of the shipment;

(iii) the originating point of the shipment;

(iv) the name of the originating carrier;

(v) the names of connecting carriers, if any;

(vi) the name and address of the consignee (receiver of goods);

(vii) the destination of the shipment (if different from the address of the consignee);

(viii) particulars of the goods in the shipment, including weight and description;

(b) a bill of lading issued under this subsection must also contain the following:

(i) a provision stipulating whether the goods are received in apparent good order and condition, or otherwise;

(ii) a space to show the declared value of the shipment;

(iii) a space to indicate whether transportation charges are prepaid or collect;

(iv) a space in which to note any special agreement between the consignor and the carrier;

(v) a statement in conspicuous form to indicate (if such is the case) that the carrier's liability is limited by a term or condition of the carrier's applicable schedule of rates or by any other agreement with the consignor;

(vi) a statement of notice of claim as provided for by Article 12 of the Specified Conditions of Carriage set out in paragraph (c);

(c) a bill of lading issued under this subsection must be signed by the consignor or the consignor's agent and the originating carrier or that carrier's agent and must contain or incorporate by reference all the following conditions of carriage:

Specified Conditions of Carriage

...

Article 9: Subject to Article 10, the amount of any loss or damage for which the carrier is liable, whether or not such loss or damage results from negligence, is to be computed on the basis of the value of the goods at the place and time of shipment (including the freight and other charges if paid and the duty if paid or payable and not refundable) unless a lower value has been represented in writing by the consignor or has been agreed on between the parties to this bill of lading, or is determined by the classification or tariff on which the rate is based, in any of which events such lower value is the amount that governs the computation of the maximum liability of the carrier.

Article 10: The amount of any loss or damage computed under Article 9 must not exceed \$2 per pound (\$4.41 per kilogram), computed on the total weight of the shipment, unless a higher value is declared on the face of the bill of lading by the consignor.

...

Article 18: Subject to Article 19, any alteration, addition or erasure in the bill of lading must be signed or initialed by the consignor or the consignor's agent and the originating carrier or that carrier's agent, and unless so acknowledged is without effect, and this bill of lading is enforceable according to its original tenor.

Article 19: It is the responsibility of the consignor to show correct shipping weights of the shipment on the bill of lading if completed by the consignor. Despite Article 18, failure to do this makes the bill of lading subject to correction in this respect by the carrier.

[34] Mr. Edinger, Overland's counsel, argues that Overland satisfied its obligations under the Regulations to issue a bill of lading by giving the bill of lading to Mandala to complete. If it was incomplete, and in particular if it was incomplete because the bill of lading did not show a weight, that does not affect the enforceability of the limitation of liability or Overland's ability to rely on that limitation.

[35] Mr. Edinger points to Article 19 of the "Specified Conditions of Carriage," which not only permits Overland (the carrier) to alter the bill of lading in respect of the weight despite the absence of a signature or initial from the consignor or the shipper, but which also, in his submission, places the responsibility on the consignor or its agent (in this case, Mandala) to show the correct shipping weight when the consignor completes the bill of lading, as Mandala did in this case. Mr. Edinger submits that the plaintiff cannot rely on Mandala's

failure to state the weight in order to avoid the limitation of liability contained in the bill of lading, given the language of Article 19.

- [36] On the other hand, Mr. Scouten, for the plaintiff, says that, pursuant to the Regulations, the legal obligation to issue a bill of lading rests with the carrier (in this case, Overland), and that the Regulations further require (per s. 37.39(1)(a)) that the bill of lading show specific information, in particular, particulars of the goods in the shipment, including the weight and description. He says that, on the facts, the bill of lading was incomplete in this respect and the omissions were not inconsequential.
- [37] Mr. Scouten argues further that Article 19 should not be interpreted in the way Mr. Edinger argues, and that the words "if completed by the consignor" have as their object the words "correct shipping weights," not (as is implicit in Mr. Edinger's argument) "the bill of lading".
- [38] For my purposes, the basic legal principles are summarized in *Paine Machine Tool Inc. v. Can-Am West Carriers Inc.*, 2003 BCCA 50. The Regulations require a bill of lading to be issued by the carrier (see *Paine*, at paras. 15 and 16), and further, they impose on the carrier the burden of issuing the bill of lading showing specified facts and containing other information about the shipment (see *Paine*, at para. 28).
- [39] In principle, the Regulations should be adhered to unless it is proved that the parties agreed to other terms for their contract: see *Paine*, at para. 25.
- [40] In my opinion, the evidence does not support the conclusion that Overland and Mandala (as the plaintiff's de facto agent) agreed to other terms, and the bill of lading must be read in the context of the requirements of the Regulations. In that light, Overland was required to adhere to the Regulations, particularly if it wishes to rely on a limitation of its liability.
- [41] I conclude that the bill of lading is not enforceable to limit Overland's liability to \$2 per pound, because it was not completed as required by the Regulations. I accept Mr. Armstrong's evidence that it was Overland's driver (Mr. Gallagher) who gave him Overland's bill of lading form. I find that, although Mr. Armstrong did sign the bill of lading, he did not consider it to be complete when Mr. Gallagher took it from him. Thus, although there is technical compliance with s. 37.39(1)(c) with respect to the signature of the consignor or the consignor's agent, I find that in fact Mr. Armstrong did not intend to sign and provide to Overland an incomplete document.
- [42] It was Overland's obligation (pursuant to the Regulations) to ensure that the bill of lading, with the information required to be completed, was properly issued. Section 37.39(1)(a)(viii) requires that the bill of lading must show particulars of the goods in the shipment, including weight and description. The Regulations make a distinction between weight and declared value. The Regulations simply require that there be a space to show the declared value, but the weight must be shown. When Mr. Gallagher left Mandala on April 6 with the bill of lading, the description of the particulars of the goods was incomplete and the weight column was blank.

- [43] I do not agree with Mr. Edinger's submission that the omission of the weight in this bill of lading is at the inconsequential end of the spectrum of omissions. As Mr. Meehan explained, Overland does not treat the absence of a statement of weight as inconsequential. A weight (initially a cube weight of 40,000 pounds) was added after the accident to ensure that Overland's paperwork was complete. This indicates that Overland recognized that, when the bill of lading was collected from Mandala, it was not complete and important information was missing.
- [44] Moreover, I agree with Mr. Scouten's construction of Article 19 of the Specified Conditions of Carriage. Mr. Edinger's construction immediately runs into difficulties where the completion of the bill of lading is a joint effort. How much of the form would have to be filled in by the consignor before it would be considered as a whole to be "completed by the consignor"? 50%? something more, or something less?
- [45] Mr. Scouten's interpretation avoids such problems because the consignor or the consignor's agent is given responsibility with respect to a specific item: weight. If the consignor or its agent fails to show the correct shipping weight, then the weight - that is, the weight shown - is subject to correction "in this respect" by the shipper. The contract of carriage can be altered in that regard and the alteration is enforceable by the carrier despite the absence of a signature or initial from the consignor or its agent. Otherwise, amendments or alterations to the bill of lading require evidence - in the form of a signature or initial - of acceptance by the consignor or its agent, pursuant to Article 18.
- [46] Here, however, there was nothing filled in by the shipper in the weight column. There was therefore nothing that could be "subject to correction." Overland gains no assistance from Article 19.
- [47] I conclude therefore that Overland did not issue a bill of lading as required by the Regulations, and it would be inappropriate for Overland to be allowed to rely on the benefits of the limitation of liability when it failed to comply with the obligations that the Regulations impose.
- [48] In view of my conclusion on the first issue, it is unnecessary for me to address the second, namely, what is the actual weight.
- [49] I turn then to damages.
- [50] Overland's liability is strict and it is not necessary for the plaintiff to prove negligence. There is no issue concerning the value of the lost goods. The dispute concerns the consequential losses claimed.
- [51] The particulars are set out in Mr. Friesen's affidavit, at para. 50. Mr. Scouten says that (with the possible exception of the heating costs, and the claim for lost profits, which has been abandoned), the amounts set out in para. 50 of Mr. Friesen's affidavit are recoverable as consequential damages.

- [52] Mr. Edinger submits that nothing is recoverable because the amounts claimed are too remote. Alternatively, he submits that only a relatively modest amount would be recoverable as damages resulting from the delay, and nothing more.
- [53] The basic principles are set out in, for example, *B.D.C. Ltd. v. Hofstrand Farms Ltd.*, [1986] 1 S.C.R. 228, at paras. 24 and following, and in *Lengert Machinery Sales Ltd. v. Kordyban Transport Ltd.*, [1968] B.C.J. No. 19 (C.A.), at para. 5. They involve the application of the well-known rules in *Hadley v. Baxendale*.
- [54] Here, Overland had no knowledge of any special circumstances respecting the plaintiff. Indeed, Overland had virtually no knowledge about the plaintiff or its circumstances generally. Overland never dealt directly with the plaintiff. Overland knew only that it was being asked to ship component parts of a commercial building to Fort Nelson.
- [55] In those circumstances any consequential damages must be based on what a reasonable person would be taken to know in the ordinary course of things (this is the first rule in *Hadley v. Baxendale*) or, in other words, what would be reasonably foreseeable.
- [56] On this point I agree generally with Mr. Edinger's alternative submissions.
- [57] Overland knew that it was transporting component parts of a commercial building, and I think a reasonable person would be taken to know, in the ordinary course of things, that a commercial building is most likely going to be used in the operating and running of a business. However, I do not see the expenses claimed in Mr. Friesen's affidavit at para. 50(c) as falling within what would be reasonably foreseeable. The heating expenses described in subparagraph (e) are expenses that would have been incurred if the building had been erected as planned, since the plan was to have the business up and operating. They are not damages caused by the loss of the goods.
- [58] On the other hand, in my view, it would be reasonably foreseeable that someone in the plaintiff's position would likely incur some additional expenses and also some costs thrown away as a consequence of the delay involved in replacing the particular goods lost; therefore, some rent, some financing costs and the type of expenses described in Mr. Friesen's affidavit at para. 50(b). Although somewhat rough and ready, I therefore assess consequential damages at \$5,000.
- [59] In summary, the plaintiff will therefore have judgment against Overland for \$122,640.59 (\$117,640.59 plus \$5,000), together with court order interest.
- [60] Unless counsel wish to make submissions, costs will follow the event. And I wish to say that I am indebted to counsel for their well-prepared material and their helpful submissions.
- [61] Do counsel wish to make any submissions concerning costs?
- [62] MR. SCOUTEN: I have no submissions today.
- [63] THE COURT: Is there anything further that we need to deal with this morning?

[64] MR. EDINGER: I don't think so, except I think at the end of the day it would be my obligation to take the binders away from you, My Lady.

[65] THE COURT: Well, Mr. Edinger, I have marked up the contents of the binders, so I will keep them.

[66] MR. EDINGER: I am happy with that. I didn't bring quite a big enough bag to bring them anyway, so I am happy with that result. Thank you, My Lady.

[67] THE COURT: Thank you.

"Adair J."

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