
CANADA / JUDGMENT

Wepruk v. Great Canadian Van Lines Ltd.

2010 BCSC 55

COURT

Supreme Court of British Columbia

DECIDED

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2010 BCSC 55 Wepruk v. Great Canadian Van Lines Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wepruk v. Great Canadian Van Lines Ltd.,

2010 BCSC 55

Date: 20100119

Docket: S097002

Registry: Vancouver

Between:

Shelley Wepruk

Appellant

And

Great Canadian Van Lines Ltd.

Respondent

Before: The Honourable Mr. Justice Pitfield

On Appeal from the Provincial Court of British Columbia

Reasons for Judgment of The Honourable Judge T.S. Woods

dated November 6, 2009 (2009 BCPC 0183)

Reasons for Judgment

The Appellant, In Person:

S. Wepruk

Agent for the Respondent:

R. Valliant

Place and Date of Hearing:

Vancouver, B.C.

November 23, 2009

Place and Date of Judgment:

Vancouver, B.C.

January 19, 2010

- [1] Ms. Wepruk appeals from a decision of the Provincial Court of British Columbia in which she was awarded damages of \$12,976, pre-judgment interest, and costs in respect of the loss and destruction of a piano which was to have been delivered by the respondent to the appellant's premises in Burnaby. Ms. Wepruk claims that the learned trial judge erred in not awarding her \$24,900 as claimed in her notice of claim filed in the Provincial Court. The respondent says that the appeal should be dismissed.
- [2] In the Provincial Court, Ms. Wepruk claimed \$4,900 for loss of goods, filing fees, and service fees for a total of \$5,176. The claim was amended on August 13, 2008 to include a claim for "general/special damages/mental distress for loss of family heirloom" in the amount of \$20,000, resulting in an increase in the total claimed to \$25,176. The notice of claim made no reference to punitive or exemplary damages.
- [3] Following a three-day trial, the learned trial judge awarded damages of \$4,500 for loss and destruction of the piano, \$200 for loss of a dresser, \$8,000 in aggravated damages, and \$276 for filing and service fees and expenses. He dismissed the claim for punitive damages which was first advanced in the course of the trial.
- [4] It goes without saying that this is an appeal rather than a trial de novo. As a result, the judgment of the learned trial judge can only be set aside or varied in the event that he erred in law, made palpable and overriding errors in the finding of facts, or overlooked evidence which, if properly considered, would have supported a different conclusion.
- [5] The detailed circumstances are set out in the learned judge's reasons for judgment, 2009 BCPC 0183, but may be summarized as follows.
- [6] In 2003, Ms. Wepruk inherited a 1924 Waltham Warfield piano from her great grandmother. Ms. Wepruk and a friend, Ms. Sutherland, travelled to Minnesota to pick up the piano which they transported to Ms. Sutherland's home in Devlin, Ontario. In 2006, Ms. Wepruk relocated to Burnaby, British Columbia. She retained the respondent to transport the piano and a dresser from Ms. Sutherland's home, a canoe from another address in Shelburne, Ontario,

and a second piano to be picked up in Ottawa. The respondent estimated the transport charges to be \$2,286.63.

- [7] Ms. Sutherland sold her residence in Devlin. The purchasers agreed that the Waltham Warfield piano could remain at the residence for a period of time until it could be picked up by the respondent.
- [8] Ms. Wepruk told Mr. Valliant, the respondent's representative, that if for any reason it became necessary, she could arrange for persons in Devlin to assist in getting the piano out of the house and on to the respondent's truck. Mr. Valliant answered by telling Ms. Wepruk that the respondent's people could manage the job. He said that someone would contact her in the unlikely event there was any need for assistance.
- [9] Pick-up was scheduled for November 25, 2006, but that proved inconvenient for the purchasers of the Sutherland home. The respondent and the new owners settled on December 5, 2006 as an alternative pick-up date.
- [10] In early December, the respondent's driver picked up the other items but by-passed the Devlin pick-up location because he did not have with him the manpower necessary to load the piano onto the truck. The respondent did not advise Ms. Wepruk that such was the case.
- [11] The other goods which the respondent had picked up were delivered to Ms. Wepruk's residence in Burnaby on December 15, 2006, at which time she noted the absence of the Waltham Warfield piano. The driver explained that he had lacked the manpower necessary to pick up the piano but told Ms. Wepruk that he would be making another trip in January or February 2007 and he would pick up the piano in Devlin at that time. The driver also told Ms. Wepruk that the new owners of the Sutherland house in Devlin had agreed to the late January or early February pick-up date, and that the instrument could remain in their house until that time.
- [12] Ms. Wepruk was out of the country in February and returned to Canada in mid-March. Upon her return, she found that the piano had still not arrived. At the end of March or early April, she called the respondent to enquire of the piano's whereabouts. Mr. Valliant told her that he was unaware that it had not already been delivered and said that he would look into the matter.
- [13] Ms. Wepruk made her own inquiries of the purchasers of the Sutherland house in Devlin. She learned that because so much time had passed without further word after the date scheduled for pick-up in early December, they concluded that the piano had been abandoned. They told her that it had been removed from the house and destroyed. The result was Ms. Wepruk's claim filed in Provincial Court on October 15, 2007.
- [14] The learned trial judge rightly concluded that the respondent had introduced no admissible evidence to explain or justify its failure to pick up the piano from the Devlin address as it had contracted to do.

- [15] Of the contract between Ms. Wepruk and the respondent, and the breach thereof, the learned trial judge said the following at paras. 42, 43, 45 and 49:
- [42] I am satisfied on the basis of the facts I have found, established upon the evidence that I have accepted, that on November 23, 2006, Great Canadian entered into a contract with Ms. Wepruk. There was an offer (the "moving proposal"), acceptance (Ms. Wepruk's e-mail accepting the "moving proposal") and consideration (\$150 by way of deposit paid by Ms. Wepruk on November 23rd and the balance of \$1,688.46 paid on December 15th). On the faith of Great Canadian's contractual promises, Ms. Wepruk changed her position and ceased her search for a moving company to relocate her possessions in Ontario to British Columbia in circumstances where the timetable for doing so was growing increasingly short. This constituted further consideration for Great Canadian's promise to pick up and deliver the Antique Piano with the agreed window of opportunity afforded by the indulgence granted by the new owners of the Devlin house.
- [43] Under the moving contract that Great Canadian entered into with Ms. Wepruk, Great Canadian assumed an obligation to pick up Ms. Wepruk's Antique Piano in Devlin on a "time is of the essence" basis and then transport it in good order to her house in Burnaby within the one-month time window stipulated for that purpose by the new owners of the Devlin house. Great Canadian was aware of the fact that the Antique Piano was being stored, on a temporary and short term basis. Ms. Wepruk impressed upon Great Canadian the importance of making a timely pick-up of the Antique Piano, given that it remained in the new owners' house in Devlin as an indulgence only, and a brief, time-limited one at that. Great Canadian accepted the assignment on that basis and Mr. Valliant gave Ms. Wepruk assurances that the work would be done on that time line. Those assurances amounted to contractual promises and they created enforceable obligations owing by Great Canadian to Ms. Wepruk. The same cannot be said about the Bill of Lading that was completed well after the actual contract between the parties had been formed and partly performed.
- ...
- [45] I find that Great Canadian breached its contract with Ms. Wepruk when it failed to pick up the Antique Piano in Devlin and deliver it to her within the time she specified. Necessarily implicit in Ms. Wepruk's bargain with Great Canadian was Great Canadian's obligation to properly inform itself about the manpower and other resources necessary to carry out the assignment and then ensure that that manpower and those resources were available so that the work was done when promised. By sending a truck with a driver and only one swamper to assist on both the eastbound and westbound legs of the journey that began in November and ended in December 2006, Great Canadian created conditions under which it could not perform its obligations to Ms. Wepruk as required. In the result, its driver simply bypassed Devlin altogether and transported the personal effects that were of least importance and value to her. Assurances made by Mr. Wilson to Ms. Wepruk about transporting the Antique Piano to her on later dates came to naught. Great Canadian did not fulfil those assurances and now events have overtaken both Ms. Wepruk and Great Canadian such that neither

party sees any prospect of the contract being performed, late, or of the Antique Piano ever being delivered to Ms. Wepruk.

...

- [49] I therefore conclude that Great Canadian's breach of contract in failing to pick up the Antique Piano from the house in Devlin as and when it promised to do so, whatever the ultimate fate of the instrument may have been, was the cause in fact of the de facto loss of the antique Piano to Ms. Wepruk absolutely and that she is therefore entitled to damages from Great Canadian to compensate her for her loss. Upon the venerable authority of *Hadley v. Baxendale*, [1854] 156 E.R. 145 at 151, Ms. Wepruk is entitled to recover damages against Great Canadian. Her right of recovery flows from the second branch of the rule in that case: that is, damages arising from the special circumstances surround her contract with the company. The facts as found leave no doubt that Great Canadian had actual knowledge, imparted to it by Ms. Wepruk, of the "special circumstances" of the time-limited indulgence granted by the new owners; it thus knew that an enhanced loss was liable to result from a breach of its obligation to make a timely pick-up: *Paddon v. Phillips Barrett Kaiser Engr. Ltd.* (1987), 18 B.C.L.R. (2d) 2438 (S.C.) at paras. 39-48. That is sufficient to justify recovery on the second branch of the *Hadley v. Baxendale* formulation. It is not necessary for Ms. Wepruk to prove that Great Canadian had anticipated any precise fate that might have befallen the Antique Piano within its contemplation; it is enough that she should that it could reasonably anticipate that if the strict deadline was not observed, something could occur that could put it beyond Great Canadian's ability ever to perform its obligation to deliver the Antique Piano to Ms. Wepruk. That is what happened here.
- [16] The learned trial judge assessed damages for the loss of the piano in the amount of \$4,500. He did so on the basis of the following evidence: Ms. Wepruk's claim in her notice of claim for recovery of the sum of \$4,900 for loss of goods; the \$6,000 estimated value of all goods provided by her in the contract documents which she insured for the sum upon payment of an insurance premium of \$42; and an appraisal performed by Robert T. Furst, an American appraiser of antique pianos, who expressed his opinion that the piano of the make in question tuned for maximum performance, cleaned and in very good condition would have a market value of \$4,850 USD.
- [17] Evidence was tendered by Ms. Wepruk in the form of photographs and verbal testimony regarding the condition of the piano from which the learned trial judge made the following findings at para. 54:
- [54] Considering the evidence about the condition of the Antique Piano, I am of the view that the \$4,850 USD figure given by Mr. Furst cannot be taken uncritically as an accurate measure of the market value of the vintage instrument that Ms. Wepruk has lost. The evidence I have mentioned above about its condition suggests to me that the largely unused Antique Piano would not have been in the immaculately restored condition that Mr. Furst's opinion contemplates. Taking all of the evidence on valuation that is before me and weighing and

sifting it with care, I conclude that \$4,500 CAD is a reasonable statement of what it would cost Ms. Wepruk to go out into the market and replace the Antique Piano with one of comparable age and condition. I find that she is entitled to general damages in that amount to compensate her for the breach, by Great Canadian, of its contractual obligation to pick up the Antique Piano in Devlin within the specified time window and deliver it in good order to her in Burnaby.

- [18] Finally, the learned trial judge acceded to Ms. Wepruk's claim that the circumstances surrounding the loss and destruction of the piano did cause her mental distress for which damages should be awarded. The learned trial judge expressed his finding at para. 71:
- [71] Giving consideration to the evidence of very real and pervasive distress and emotional suffering that was revealed in her testimony, and having regard to the authorities that I have discussed above, I conclude that Ms. Wepruk is entitled to receive \$8,000 in aggravated damages, beyond the general damages award I have already made, to compensate her for the mental distress and suffering that was caused by Great Canadian's breach of its moving contract with her.
- [19] The learned trial judge dismissed the claim for punitive damages which was first advanced at trial, noting that courts were properly reluctant to award such damages in cases where the defendant did not have proper notice that it had a punitive damages case to meet. The learned trial judge expressed his findings in relation to punitive or exemplary damages at para. 77:
- [77] Great Canadian was undoubtedly grossly cavalier about performing the contractual obligations it owed to Ms. Wepruk in relation to the move of the Antique Piano from Devlin to Burnaby. Its conduct fell well short of what any customer entrusting a treasured heirloom to it for safe delivery to its destination would reasonably expect. However, the threshold for granting punitive damages is properly a very high one and I am not persuaded that Great Canadian's conduct cleared that threshold. Great Canadian was inept and insensitive but it was not malicious or oppressive. Accordingly, I decline to make an award of punitive damages against Great Canadian on the facts of this case. Rather, I consider it appropriate to confine the damages awards I make against Great Canadian in Ms. Wepruk's favour to compensatory awards only.
- [20] On this appeal, Ms. Wepruk claims that the learned trial judge did not determine a reasonable replacement value for the lost or destroyed piano, did not assess aggravated damages at a reasonable amount, did not order the return of amounts paid by her to the respondent for goods delivered, and erred in omitting to assess punitive or exemplary damages.

- [21] This is a case in which Ms. Wepruk asserted a claim for loss of goods. She did not specify whether her claim was grounded in contract or the tort of negligence. While it may have been helpful for her to do so, I see nothing in the form of claim used in the Provincial Court which requires her to do so.
- [22] In this case, it appears appropriate for Ms. Wepruk to claim either in contract or in tort. The respondent clearly breached a contract by failing to transport goods which it had contracted to deliver. The respondent was also negligent in that it omitted to apprise Ms. Wepruk of the staffing difficulties which it had encountered and the resulting inability to pick up the piano as it had agreed to do. As a result, Ms. Wepruk was deprived of the opportunity to make other arrangements for the transport of the piano.
- [23] On the facts of this case there is no apparent reason why the award of damages arising out of a breach of the contract should differ from the award of damages arising out of the tort of negligence. The substance of the claim in each case is the loss of the piano and the mental anguish associated with its loss.
- [24] The task before the learned trial judge was to assess the actual amount of Ms. Wepruk's loss by reference to all of the admissible evidence before him. In that regard, Ms. Wepruk stated in her notice of claim that the amount she sought in respect of the loss was \$4,900. She tendered an appraisal without the accompanying evidence of the appraiser by whom it was prepared indicating that value was \$4,850 USD. No objection appears to have been raised by the respondent to the introduction of that evidence. There was no evidence before the court, as appears from the record, that would suggest that the replacement cost of a new or used Waltham Warfield piano was the sum of \$19,700 now suggested by Ms. Wepruk or any amount approaching that sum. The evidence indicates that pianos of this kind were not manufactured after 1931.
- [25] The appraisal tendered by Ms. Wepruk indicates that pianos of like kind, even if not of the same year of manufacture, are available in the market place. With respect, it is not open to Ms. Wepruk to say that a new upright piano, not of the 1924 Waltham Warfield vintage or kind, would cost \$19,700 and she should be awarded that amount. In addition to such a piano being of substantially different kind and quality to that which was lost, there is evidence, as tendered by Ms. Wepruk, that pianos that are similar in kind and quality to that which was lost or destroyed are available in the market place and the price thereof is in the range of \$4,850 USD.
- [26] Working from the evidence before him, the trial judge considered all of the evidence with respect to the condition of the piano owned by Ms. Wepruk and exercised his judgment to assess the value of that which had been lost as the amount which he concluded Ms. Wepruk would have to pay in order to acquire a replacement piano of like, quality and condition and vintage, should she wish to do so. I see no error in the approach taken by the learned trial judge or the conclusion he reached.

- [27] In relation to the question of aggravated damages, it must be observed that the learned trial judge considered Ms. Wepruk's evidence regarding the impact of the loss upon her and the mental anguish associated with the loss. At the same time he noted that the piano had been unused in her great grandmother's home for a number of years and remained unused in Ms. Sutherland's home from 2003 until its apparent destruction in 2007. Based upon the evidence before him, the learned trial judge assessed aggravated damages associated with the loss in the amount of \$8,000. With respect, the award was generous rather than conservative and I see no basis on the evidence or in law which would justify interference with the assessment.
- [28] Likewise, the award of exemplary or punitive damages is largely in the discretion of the trial judge as the purpose of such an award is to punish the defendant or respondent rather than to compensate the claimant for loss. I am not able to say that the trial judge exercised his discretion on the basis of any incorrect principle. That being the case, I would not interfere with his decision not to award exemplary damages and to award compensatory damages only.
- [29] The final claim made by Ms. Wepruk on appeal is that she should be entitled to recover the amounts she paid to the respondent for delivery of goods to Burnaby. With respect, that claim must fail. The amount actually charged was determined by reference to the weight of the goods carried and the distance travelled. No charges, other than in respect of insurance, appear to have been levied by the respondent in relation to the Waltham Warfield piano which was not transported as it should have been. Ms. Wepruk received other goods and paid fair value for the transport. Ms. Wepruk has been the beneficiary of the insurance premium as the payment permitted her to recover an amount in excess of the limit that would likely otherwise apply to a common carrier. There is no basis upon which to claim recovery of any amount paid for services actually rendered by the respondent.
- [30] In the course of argument, Ms. Wepruk cited a number of authorities related to the law of bailment. The law of bailment has no application in the circumstances as the respondent never took possession of the piano which was to have been transported. Possession by the bailee is fundamental to any claim based on the law of bailment. The other authorities regarding damages cited by Ms. Wepruk are unique to their facts. In most of the cases cited, a replacement property had been acquired to replace that which was lost. In those instances, there was an actual base from which to determine replacement cost and to assess the degree of betterment. In this instance, no replacement has been required and the evidence tendered by Ms. Wepruk herself was that were she to acquire a replacement of like kind and quality, the cost of doing so would be in the range of the amount assessed by the learned trial judge.
- [31] The appeal is dismissed.
- [32] The respondent is entitled to costs.

"Mr. Justice Pitfield"

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