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Indexed as: Canterra Stone Ltd. v. TransX Ltd.  
Cited as: 2004 MBQB 76  
(Winnipeg Centre)

**COURT OF QUEEN'S BENCH OF MANITOBA**

**B E T W E E N:**

CANTERRA STONE LTD.	)	
	)	<u>D. Ryall</u>
	)	for the plaintiff
- and -	)	
	)	
TRANSX LTD.	)	<u>S. Scarfone</u>
	)	for the defendant
	)	
	)	JUDGMENT DELIVERED:
	)	March 25, 2004

2004 MBQB 76 (CanLII)

**GREENBERG J.**

[1] Canterra Stone Ltd. is in the business of importing furniture and household accessories from Mexico for distribution in Canada. It contracted with TransX Ltd., a trucking firm, to bring a truckload of stone furniture and accessories from Monterrey, Mexico to Calgary, Alberta. The cargo arrived damaged. Canterra now sues for its loss.

**FACTS**

[2] Wayne Babych is the sole owner and operator of Canterra Stone. His supplier is a family business in Monterrey, Mexico called Fabricantes de Canterra. On two occasions before the incident that gave rise to this lawsuit, Babych had

gone to Mexico, purchased a number of items from Fabricantes, and arranged for their transport back to Canada.

[3] As a result of these two prior experiences, Babych realized that it was important for him to monitor the loading of the inventory onto the truck for shipment back to Canada. He also learned that, considering the costs of the freight, to maximize his profit he should ensure that the truck is filled to capacity.

[4] With this in mind, in the spring of 2000, he made inquiries of various trucking firms to arrange transportation of a third shipment to Canada. He decided to hire TransX. He made it clear to TransX employees that he would have to be in Mexico when the truck was loaded. Babych says that the TransX employees assured him that they could have a truck in Mexico when he needed it.

[5] Babych made two trips to Mexico to arrange the shipment of goods. In May 2000, he went to Mexico to purchase items from Fabricantes. He then returned in July 2000 to supervise the loading of the goods onto the truck. Under his arrangement with TransX he was to pay a flat rate for the use of the truck's entire trailer. Therefore, it was his intention to purchase more items on the second trip if what he purchased on the first trip did not fill the trailer. It was important to him to get the full value out of the freight charge.

[6] Babych says that he spoke to TransX employees on three occasions before his July trip to emphasize the importance of his being in Mexico when the truck arrived so that he could load the trailer. His final call was on Friday, July 7,

2000. On that day he called TransX to advise them that he needed a truck for the following week.

[7] He flew to Monterrey on Monday, July 10, arriving late at night, with a return ticket for July 13, 2002. While in the Toronto airport on route to Mexico, he called TransX to confirm that the truck would be in Mexico when he got there. When the truck was not in Mexico on July 11<sup>th</sup>, he called TransX again.

[8] When Babych left Monterrey early in the morning of July 13<sup>th</sup>, the truck had still not arrived. It eventually arrived during the day of July 13<sup>th</sup>. Babych had not cancelled the truck when it did not arrive as expected, nor did he give any instructions to Fabricantes as to what to do if the truck did arrive in his absence. Fabricantes proceeded to load the merchandise onto the truck and, ultimately, it arrived in Calgary with significant damage.

[9] Babych took a series of photos of the goods when they arrived in Calgary. The photos demonstrate that there was significant damage to the load. Although the trailer that arrived in Calgary was largely empty, a number of the items that Babych had purchased in Mexico were not loaded onto the truck.

[10] The plaintiff claims damages both for the items that were delivered and damaged and for those that were not delivered. It also claims reimbursement of the freight charges that it paid to TransX and compensation for the airfare for the two trips to Mexico that Babych made to arrange for the shipping. The total amount claimed is slightly in excess of \$14,000.

## ISSUES

[11] The plaintiff argues that the defendant is liable for the damages claimed for two reasons.

[12] First, it says that the defendant is liable for breach of the contract of carriage. The cargo was in good condition when it left Mexico and damaged when it arrived in Calgary. As the damage occurred in transit, the plaintiff says that the defendant is liable.

[13] Alternatively, the plaintiff relies on the existence of a collateral warranty by the defendant to the effect that the truck would be in Mexico when Babych was there so that he could supervise its loading. The plaintiff says it was a breach of this collateral warranty which resulted in the damage.

[14] Assuming the plaintiff has established liability on either basis, there is an issue as to whether it has proven its damage.

## CONTRACT OF CARRIAGE

[15] It is not disputed that the cargo was loaded onto TransX's trailer in good order and arrived damaged. It is clear, therefore, that the goods were damaged in transit. These circumstances shift the onus to the carrier to prove that the damage was not a result of its negligence [*United Refrigerator Parts Co. Ltd. v. Consolidated Fastfrate Ltd. et al.* (1974), 46 D.L.R. (3d) 290 (Man. C.A.)].

[16] In this case, an examination of the photographs filed by the plaintiff make the cause of the damage obvious. The cargo was comprised of large clay pieces that were stacked in a haphazard way, one on top of the other, with virtually no

protection from contact between the pieces and no means of keeping the various pieces immobile so that they would not bang up against one another. The items were not boxed or crated, most were not wrapped in a protective wrapper, such as foam, and no strapping was used.

[17] Plaintiff's counsel essentially conceded that the cause of the damage was improper packing and it is clear from Babych's evidence that this was the reason why he wanted to be in Mexico to supervise the packing. He had previous experience with an earlier shipment where the entire cargo had been damaged in transit.

[18] The evidence of Craig Esquivel, an employee of TransX, was that the practice in the industry is for the shipper to prepare the goods for shipment and to load the trailer. This practice is in fact reflected in the law. The general principles are described in *McNeil, Motor Carrier Cargo Claims (4<sup>th</sup> ed.)*, at p. 141-142:

(i) *Packing, Loading and Securing*

In the general case, it is considered the obligation of the shipper to pack goods in a fashion that they be able to withstand the ordinary rigours of transportation. This proposition is evident from *D. M. Duncan Machinery Co. Ltd. v. Canadian National Railway Co.* [[1951] O.R. 578]. In that case, an unsecured counterbalance inside a crane caused damage to the crane during transit. The purchaser's action against the carrier was dismissed and liability was fastened on the shipper for negligently failing to pack the cargo properly. In the course of dismissing the action against the carrier, a broader proposition was stated by the trial judge, that the defence of bad packing is one that was available to the carrier even where he carried with the full knowledge of its condition. That proposition is probably acceptable so long as it does not involve negligence on the part of the carrier.

...

The carrier will not, in the general case, be expected to second guess the shipper's efforts or ability to protect the cargo that it is shipping. The carrier is not employed because of any expertise he has in packing cargo, but rather because he operates a facility that travels from destination to destination and can carry cargo. The suggestion that there is some kind of paramount duty on the carrier to see that the cargo is in a proper and fit condition for transportation was rejected in *Pacific Great Eastern Railway Co. v. Bridge River Power Co.* [[1944] S.C.R. 196], although the court, in passing judgment, seems to reflect that it is more a factual matter than a question of law, by saying:

It does not appear that the railway company in any sense undertook any supervision over the preparation of the crane for shipment or that it had at the place of shipment any employee competent, as compared with the Power Company's own employees, to judge the sufficiency of any measures to be taken to prevent the crane moving in transit.

. . .

This action was brought to the Power Company against the railway company for damages to its crane on the ground that there was a paramount duty, over and beyond any undertaking of the Power Company to get the crane ready for shipment, to see that the crane was in a proper condition for shipment and to carry it safely. I cannot accept that contention.

In delivering his judgment in this case, Rand J. expressed the view that it was the duty of the shipper to attend to such preparation as is necessary to enable the goods to withstand the incidents of transportation and that:

It is the interest of the shipper in his property that is primarily regarded and, apart from special circumstances, if the goods are insufficiently packed or other wise secured, the shipper must bear the resulting loss or damage. That is the first aspect.

[19] It is admitted in the agreed statement of facts filed by the parties that the freight was prepared for shipment and loaded by Fabricantes. Moreover, Babych admitted in evidence that the damage to the goods was caused by improper

packing. When asked in cross-examination whether the goods were properly packed, he answered:

Properly packed? Obviously they weren't properly packed or else they wouldn't have been broken.

[20] As the damage to the freight was a result of improper packaging by the shipper, TransX has no liability for the damage based on the contract of carriage.

#### COLLATERAL WARRANTY

[21] The plaintiff's alternative claim is based on collateral warranty. Babych says that TransX undertook to have a truck in Monterey when he was there so that he could supervise the loading of the trailer. It was a breach of that agreement that prevented him from supervising the loading and therefore resulted in the damage to the cargo.

[22] Craig Esquivel was the customer service representative at TransX at the time the plaintiff arranged for the shipment. He was responsible for taking customers' orders and, having worked in shipping in Mexico, was familiar with the transport industry there. Esquivel had spoken to Babych three to four times regarding arranging a trailer in Mexico. He knew that it was important for Babych to be in Mexico for delivery. He advised Babych that he needed three or four days' notice of when Babych would be in Mexico. He claims, however, that Babych never told him the specific dates that he would be in Mexico. Esquivel claims that it is usual for TransX to get a written confirmation of some sort from a client before entering the request for a truck into their computer and that no written confirmation came in this case.

[23] Esquivel also testified that he could not promise a customer a specific date for arrival of a truck in Mexico and that he told Babych that. While he may well have said that to Babych, I believe that he assured Babych that he would have a truck within a certain range of dates on three or four days notice. In view of the importance to Babych of his being in Mexico for delivery, and in view of the fact that Esquivel understood this, I do not believe that Babych would have hired the defendant for the job without this assurance. The real factual dispute relates to whether Babych in fact gave Esquivel the details about when he would be in Mexico. Did he give him the necessary three or four days notice?

[24] Babych testified that he told Esquivel on a number of occasions when he would be in Mexico. Specifically, on Friday, July 7, 2000, he spoke to Esquivel and told him he would be in Mexico from July 11<sup>th</sup> to July 13<sup>th</sup> (Tuesday to Thursday of the following week). Esquivel acknowledges this conversation but says Babych never gave him any specific dates. He claims that when Babych called on that Friday, he only said that he would be in Mexico "next week". In view of the fact that Esquivel said that he needed three to four days to arrange for a truck, one wonders why he did not treat Babych's call as the notice that he needed and immediately proceed to make arrangements for the truck. What could he have thought "next week" meant? His explanation that Babych had not given him a specific date does not make sense in view of his claim that he could not arrange a truck for a specific date but only for a range of dates.

[25] In any event, I need not determine whether Esquivel was told specifically what dates Babych would be in Mexico because, even if I accept Babych's testimony and find that there was a warranty to have a truck in Mexico between July 11 and 13, I can find no breach of the warranty because the truck did in fact arrive at Babych's supplier on July 13, 2000. Unfortunately, as Babych had arranged to fly out of Monterrey early in the morning, he missed the truck.

[26] Babych had a number of conversations with TransX between July 10<sup>th</sup> and 12<sup>th</sup> asking the whereabouts of the truck. (As Esquivel was then on holiday, these conversations were with other TransX employees.) However, if there was a warranty, it was based on Esquivel's conversations with Babych before Babych's arrival in Mexico, that is, the conversations on July 7<sup>th</sup> or earlier. Those were the conversations on which Babych claimed to place reliance. However, according to Babych, the dates given to Esquivel at that time were July 11<sup>th</sup> to 13<sup>th</sup>. (In fact Babych confirmed that these were the dates that he had given to Esquivel in a letter that he wrote to TransX on September 6, 2000, after the goods were delivered damaged.) While Babych told TransX that he would be in Monterrey on July 13<sup>th</sup> his flight left at 8:40 a.m. that day and, because the flight was so early, he had spent the night at the airport. So there was no way that he could have been at the Fabricantes warehouse that day to meet the TransX truck.

[27] Even assuming that there was a warranty as to when the truck would be in Mexico, TransX did not breach that warranty.

## DAMAGES

[28] Even if I had found negligence on the defendant's part, or a breach of a warranty, I would have difficulty assessing damages. The only aspect of the claim with respect to which the plaintiff's damage is clear is the freight charge. The value of the damaged and undelivered goods is impossible to determine on the basis of the evidence.

### Value of the Goods

[29] There is no question that there was extensive damage to the items that were delivered. The difficulty is that there is no satisfactory evidence as to what goods actually arrived in Calgary damaged, what goods were left behind and what the cost of these items were.

[30] Although Babych unloaded the goods in Calgary, and subsequently loaded them onto a truck that he rented to transport them to another location for storage, he never made an inventory of the items that arrived in Calgary and which of these items were damaged. Instead, the plaintiff attempted to prove what arrived damaged and what did not arrive by Babych examining, during the course of his evidence, a series of pictures which he took while the items were still in the truck piled on top of one another. As he viewed the pictures, he attempted to identify the items in the truck and correlate them to items in the invoices that he filed as proof of their value. Because the items in the truck were still in a heap, this task proved difficult. For example, the invoices showed the

purchase of, among other things, a set of balls and some boxes. Here is Babych's evidence as to whether these items arrived in Calgary:

Q Some of the other items, one set of balls? Have you seen those items in the photographs?

A No, I have not.

Q Four boxes, did those items arrive?

A No, I did not see the four boxes in here. Maybe one, one box. This might be considered a box. . . .

[31] Adding to the difficulty in identifying the items in this manner is that Babych's assessment of his loss has changed throughout the proceedings. The initial claim to TransX was set out in Babych's letter of September 6, 2000 to Esquivel. In that letter, Babych stated that 40 "chimineas" (fireplaces) and 40 vases were not loaded onto the truck in Mexico. But the plaintiff's initial statement of claim states that 40 chimineas and 40 sets of vases were damaged in transit. The claim was subsequently amended to say that these items were either damaged or delivered. At the trial, the plaintiff filed invoices showing he had purchased 27 chimineas, 5 sets of vases and a number of other ornamental items. The claim for the chimineas was abandoned altogether after cross-examination of Babych, during which he was unable to state how many of these were actually delivered and whether he had in fact paid for those that were not.

[32] While the plaintiff produced Visa bills and invoices for the products purchased showing the total cost of all items to be \$8,618, the September 6, 2000 letter claims the value of undelivered items totalled \$3,160 and the value of

the goods that were damaged was \$2,400, for a total cost of \$5,560. Babych was unable to explain how he had arrived at these figures.

[33] This is a case where it is clear that the plaintiff has suffered some loss. The difficulty, had I found the defendant liable for that loss, is determining the amount of the loss. I appreciate that the difficulty of proving damage does not relieve the wrongdoer of the obligation to pay damages for breach of contract [*Wood v. Grand Valley R. Co.* (1913), 16 D.L.R. 361 (S.C.C.)]. However, this is not a case where damages should have been difficult to determine. As stated by Bowen L.J. in *Ratcliffe v. Evans*, [1892] 2 Q.B. 524 (C.A.), at pp. 532-533:

As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.

### CONCLUSION

[34] In the result, the plaintiff's claim is dismissed. Although counsel did not address costs, as the defendant has been successful, I would ordinarily grant costs in its favour on the basis of the tariff. If counsel wish to argue that there should be some other disposition, they can arrange an appearance before me to argue the issue.