Date: 19971124 Docket No. CA 138317

NOVA SCOTIA COURT OF APPEAL
Cite as: Classic Seafoods v. Nippon Express Canada Ltd., 1997 NSCA 186

Chipman, Jones and Bateman, JJ.A.

BETWEEN:		)	
		)	
CLASSIC SEAFOODS		)	David G. Coles and
		)	Peter J. Driscoll
	Appellant	)	for the Appellant
		)	
- and -		)	
		)	
NIPPON EXPRESS CANADA LIMITED		)	Kenneth A. MacInnis, Q.C.
		)	and Sandy MacIntosh
	Respondent	)	for the Respondent
		)	
		)	
		)	
		)	Appeal Heard:
		)	November 13, 1997
		)	
		)	
		)	Judgment Delivered:
		)	November 25, 1997

THE COURT: The appeal is dismissed with costs as per reasons for judgment of Chipman, J.A.; Jones and Bateman, JJ.A., concurring.

CHIPMAN, J.A.:

This is an appeal from a decision of Mr. Justice Michael MacDonald dismissing an action for breach of a contract to transport lobsters to Europe.

Classic is a Nova Scotia seafood broker; Nippon is the Canadian subsidiary of an international freight forwarding company. On December 18, 1993, the parties entered into a written agreement (the split charter agreement) whereby Nippon was to arrange the transport of over 10,000 kilograms of live lobsters from Halifax International Airport to Brussels for the New Year's Eve market. Nippon was to charter an aircraft and then sell space to dealers such as Classic, who would normally have insufficient product to require a full aircraft. The flight was to depart Halifax for Amsterdam on December 28, 1993. The cargo would then be trucked to Brussels. The split charter agreement contained a provision whereby Nippon undertook to charter the aircraft from an Amsterdam based carrier, Martinair Holland NV. Nippon sent a copy of its charter agreement with Martinair to Classic on December 18, 1993.

John Van Tol was in charge of Nippon's Halifax office. He testified that his first inkling of any problem came on the morning of December 27. At approximately 10:30 a.m., he received word from Nippon's office in Belgium regarding a potential delay. He promptly called Martinair at its Florida office and was told they would get back to him. Martinair called him about 10 minutes later and advised that the aircraft scheduled to perform the charter was grounded in Montreal, but that a second one was commissioned from Bogota, Columbia. This would result in a net delay of two to three hours. Mr. Van Tol immediately called all of his split charter customers, including Classic's manager, Rick

Murphy.

Between 1:00 and 1:30 p.m. local time, Mr. Van Tol received another call from Martinair advising that the second aircraft sustained engine damage, which would result in a further four hour delay. Again, Van Tol contacted Murphy and advised him of the total delay of seven hours. Van Tol and Murphy began discussing alternatives in the event of a further delay.

At approximately 3:30 p.m. local time, Van Tol was informed by Martinair that it could not determine the status of the delay and requested cancellation of the charter, which was done. Van Tol promptly advised Murphy. They focused on alternatives, Mr. Van Tol placing several calls to find other carriers. Van Tol sent a fax to Classic on December 27 confirming that the charter had been cancelled by Martinair, and assuring Classic that it had explored every possible option. Indeed, on December 28, Van Tol was successful in finding space to move a small portion of the lobsters for Classic. In this respect, the trial judge found that at no time did Nippon give an unfair preference to its other customers over Classic in the matter of finding alternative space.

By fax dated December 28, 1993, Martinair confirmed to Nippon its inability to perform the charter and advised that a refund of monies paid by Nippon was being processed.

Mr. Justice MacDonald held that the following clause in the Split Charter Agreement relieved Nippon of any liability to Classic for the failure of Martinair to perform its charter:

> NEGA (Nippon) shall not have any responsibility and/or liability for any inconveniences caused by delays, irregularities, or cancellation of charter caused by the airline, trucking company and/or delayed irregular procedure of Customs, Government and related organizations at destination and/or origin.

Mr. Justice MacDonald appears to have accepted that there was an implied term in the contract that Nippon would take all reasonable steps to cause delivery of the lobsters in a timely manner. Following a review of the evidence, he found that Nippon did everything reasonably possible to inform Classic of events as they occurred. He dismissed any suggestion that Nippon knew, or ought to have known, prior to December 27, 1993, that the charter was in peril. He dismissed Classic's action, fixing its damages at $23,533.21. He also allowed Nippon's counter-claim against Classic in the amount of $11,050.14, including prejudgment interest.

On appeal to this Court, the appellant contends that Justice MacDonald erred:

> 1. In finding that the exclusion clause in the split charter agreement operated to absolve Nippon from liability in the circumstances.
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> 2. In finding that Nippon took all reasonable steps to avoid Classic's loss.
>
> 3. In the fact finding process, by failing to consider relevant evidence and in misapprehending the evidence.

The third contention is central to both of the first two, and it is therefore useful to deal with it first.

Simply put, on the basis of a chain of correspondence and documents

obtained by Nippon from Martinair in January of 1994, Classic contends that Nippon knew or ought to have known on or about December 24, 1993, that Martinair had not, in fact, arranged for an aircraft for December 28 from Halifax. Nippon, it is said, should have advised Classic of this fact at that time and/or taken steps to assure alternative transportation for the lobsters in time for the New Year's Eve market.

I do not accept Classic's submission on this point.

Following the cancellation by Martinair of the charter, Classic asked Nippon to secure information respecting the cancellation. Nippon forwarded this request to Martinair and in January, 1994, was provided with letters and documents in response. At the trial, Mr. Justice MacDonald admitted this material. As to most of it, he ruled that it was admitted not as proof of its contents, but for the limited purpose of explaining the actions of Nippon in response to Classic's inquiries. As to four documents he made no specific ruling, but in my view the ruling he made ought to apply equally to them.

In any case, this material did not come to Nippon's attention until after the event. There was no other evidence to suggest that Nippon knew or ought to have known before December 27 that the charter was in peril either because there was no aircraft made available by Martinair or for any other cause such as mechanical failure or weather. The trial judge's finding that no reliable evidence supported the conclusion that Nippon was aware of any problem before December 27, is therefore correct.

This conclusion is not only sufficient to dispose of Classic's second contention, but as to the first, it removes any support for the contention that Nippon is precluded from relying on the exclusion clause because of fundamental breach of contract by reason of knowledge prior to the time of performance that Martinair had no aircraft.

Therefore, the only remaining point for consideration is Classic's first submission that the exclusion clause is insufficient in its wording to relieve Nippon for the default of Martinair.

I repeat the exclusion clause:

> NEGA (Nippon) shall not have any responsibility and/or liability for any inconveniences caused by delays, irregularities, or cancellation of charter caused by the airline, trucking company and/or delayed irregular procedure of Customs, Government and related organizations at destination and/or origin.

Classic says that on its face the clause exempts Nippon from liability for "inconveniences". Referring to Webster's Dictionary definition of "inconvenience" as "discomfort, trouble, to put to trouble", Classic says that the word imports minor disruptions and difficulty falling far short of the catastrophic type of event involved here - the total failure of the charter to operate. Classic characterizes the outcome here as a fundamental breach of contract, a total failure of consideration, a disappearance of the foundation of contract - as opposed to a mere inconvenience. Only the latter is covered by the clause. Classic refers to the following passage from G. H. Treitel, the **Law of Contract** (9th Edition), 1995, at p. 197:

> A party who wishes to rely on a clause excluding or limiting liability must show that the clause has been incorporated in the contract, and also that, on its true construction, it covers the breach which has occurred and the resulting loss or damage. Even if he can show these things, he may still find that the clause is invalid or inoperative.

Classic also contends that even if the clause meets this test, it fails to absolve Nippon because it is an exclusion that is unfair, unreasonable or unconscionable, citing **Hunter Engineering Co. Inc. et al. v. Syncrude Canada Ltd.** (1989), 57 D.L.R. (4th) 321 (S.C.C.); and **ACA Cooperative Association Ltd. v. Associated Freezers of Canada Inc. et al (No. 3)** (1990), 97 N.S.R. (2d) 91 (C.A.).

The trial judge, rejecting Classic's submission that the clause was ambiguous and should be construed **contra proferentem,** found that the clause was clear and unambiguous. It contemplates the cancellation of flights and limits liability accordingly.

I agree fully with this conclusion. The word "inconveniences" and the disruption it implies, is clearly coloured by the reference to cancellation of a charter by the airline - the very thing that happened here. Inconveniences can be of a great or of a minor nature, but when the term is used in the context of charter cancellation, it means disruption proportionate to such a cancellation. Classic suffered an inconvenience as a result of the cancellation. The clause was plainly intended to address exactly what happened.

In coming to this conclusion, I am mindful that these parties appear to be of equal bargaining power. The nature of the transactions in which they engage shows them to be experienced in business. Anybody shipping a large valuable cargo for a time sensitive market would contemplate the risk of delay and cancellation of the mode of transportation selected. The cost of the services can, in such circumstances, be taken to reflect where the parties choose to place the risk of such misadventures. Most appropriate are the following words of Lord Diplock in **Federal Commerce and Navigation Co. Ltd.**

v. Tradax Export S.A., [1978] A.C. 1 at p. 7.

> My Lords, the freight market for chartered vessels still remains a classic example of a free market. It is world-wide in coverage, highly competitive and sensitive to fluctuations in supply and demand. It is a market in which the individual charterers and shipowners are matched in bargaining power and are at liberty to enter into charterparties in whatever contractual terms they please . . .
>
> So far as to profitability of the transaction to each party concerned, there is an inter-relationship between rates of freight, demurrage and dispatch money and clauses of the charterparty which deal with the allocation between the charterer and the shipowner of those risks of delay in the prosecution of the adventure contemplated by the charterparty which, being beyond the control of either party, have been conveniently called, "misfortune risks" as distinguished from "fault risks". Among the most prevalent of misfortune risks is congestion at a loading or discharging port causing the vessel to wait idly until a berth falls vacant at which her cargo can be loaded or discharged. If it is to wait at the shipowner's expense he will endeavour to secure that this risk is covered in the freight rate that he charges. If it is to wait at the expense of the charterer and paid for as demurrage or by reduction in dispatch money he will expect this to be reflected in a lower freight rate charged . . .
>
> It is no part of the function of a court of justice to dictate to charterers and shipowners the terms of the contracts into which they ought to enter on the freight market . . .

The "misfortune risk" was clearly identified by Nippon and Classic, and they directed where it should fall. The clause conveys their intention in the clearest possible terms. As well, I am unable to agree that there is anything about this clause that could be characterized as unfair or unreasonable or tainted by any sharp or unfair dealing.

I reject the submission of Classic with respect to the exclusion clause.

In the result, I would dismiss the appeal with costs which are fixed at $1,440.00, being 40% of the costs set by the trial judge, together with disbursements to be taxed.

Chipman, J.A.

Concurred in:

Jones, J.A.

Bateman, J.A.