IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *FFAF Cargo v. Connors Transfer Ltd.*, 2020 NSSM 24

Date: 20201130
Claim: No. SCP 499637
Registry: Pictou

Between:

Flying Fresh Air Freight, doing business as FFAF Cargo

CLAIMANT

And

Connors Transfer Limited

DEFENDANT

Adjudicator:	Raffi A. Balmanoukian, Adjudicator
Heard:	November 16, 2020, by videoconference to New Glasgow, Nova Scotia
Final Written Submissions:	November 16, 2020
Counsel:	Christopher Onderwater, for the Claimant Natasha Schigas, appearing for Donn Fraser, for the Defendant

Balmanoukian, Adjudicator:

[1] With the arguable exception of the Great Moosehead Beer Heist of 2004[1], a trucking story doesn't get more Atlantic Canadian than this.

[2] The Claimant ships or arranges for the shipment of lobster all over the world. This humble crustacean has, over years, deservedly evolved from a food served to prisoners and domestic staff[2], to a prestigious luxury product found in the most discerning and lucrative markets. It is commonly seen amongst the caviar in the finest fishmongers of the world[3]. The premium examples attract premium prices and are in high demand during festive and holiday seasons across cultures and continents. As a reflection of supply and demand, lobster licenses routinely change hands for eye-watering sums. Within our ocean playground, there are few who – other than for allergic or religious reasons – eschew the seasonal opportunity to partake.

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[1] https://en.wikipedia.org/wiki/Moosehead_Breweries#Stolen_batch , retrieved November 28, 2020

[2] It is a common story among folk of a certain age in Nova Scotia that the poor kids went to school with a lunch of lobster sandwiches, while those of less modest means had bologna or peanut butter. In Victorian England, one of the few negotiating points a domestic servant had was the ability to extract the promise that the homeowners would serve them lobster no more than two or three times a week. How times change.

[3] I was bemused in 2014 to see cooked Atlantic Canadian lobster on offer in London's Harrods seafood hall – belly down on fresh ice, still banded, at something like the equivalent of $35 a pound. I'm willing to bet it wasn't cooked with enough salt, either.

[3] Predictably, proper transport is critical to the delivery of a fresh or live product to markets afar. For this, the Claimant ("FFAF") has developed a niche service. It transports or arranges for the global transport of our live and fresh seafood. For this purpose, it engages transportation companies such as the Defendant ("Connors") to get the product from processing plants, brokers, and other facilities to locations such as airports for its onward journey; most notably for our purposes Halifax, Toronto, and Montreal. One shipment at issue in these proceedings was by ground throughout.

[4] Most times, matters go smoothly. One series of shipments did not, and a disproportionate number of lobsters arrived bereft of life. These *Homarus americanus* who had prematurely joined the choir invisible had to be destroyed or sold "as is" for salvage value. This litigation is the result.

[5] Patrick Milligan, the only witness in this proceeding, is FFAF's manager of capacity and capacity sales. He testified under affirmation virtually[4], and his evidence was not materially challenged.

[6] He testified that over the years, FFAF and Connors developed what he termed a "strong partnership." Connors is FFAF's "main, but not only partner" in

[4] Specifically, Skype for Business. Counsel and I appeared by video, and Mr. Milligan appeared by phone. A representative of Connors also appeared by phone, but did not testify.

local transport. They began doing business in 2014-5. At that time, it appeared that FFAF's only indemnity requirement of Connors was that it provide evidence of insurance. There was no contractual waiver of liability at that time. Matters went smoothly, and as far as Mr. Milligan could recall, there were no prior claims or losses.

[7] In late 2017, Connors sent Milligan a limitation of liability form, which purported to limit liability to an overall amount of "$2.00 per pound computed on the total weight of the shipment."[5] It further purported to exclude liability, in full, for "loss arising from…..death or injury to live animals, birds, fish and lobster."[6] Milligan received permission from his superiors to agree to this document, signed on March 23, 2018. In the exchange between he and Robert Small of Connors, he asked, "[a]lso, as we discussed, the 2.00/lb will remain in place, this is just further limiting the liability, is that correct?"[7] Small replied on January 11, 2018, "We are looking to be clear with all that Connors liability is $2.00/Lbs. This is what we have in place with all our high value shippers."[8] As will become clear, in my

[5] Claimant's exhibit 6B
[6] Ibid. For current purposes, I am prepared to ignore the omission of a terminal (sometimes referred to as an Oxford or Serial) comma and treat "fish and lobster" as disjunctive. That is, I am prepared to consider the applicability of this clause notwithstanding that this shipment was of lobster alone, and not "fish and lobster." The day may arise in which I need to enter this grammatical minefield as a matter of interpretation. Because of the conclusions I reach on the applicability of the "lobster clause" to the case at bar, today is not that day.
[7] Claimant's Exhibit 6A
[8] Ibid

opinion this exchange in the context of a continuing course of dealings between sophisticated parties is critical to the disposition of this case.

[8] The parties continued to do business together. FFAF generally sent Connors a monthly transport forecast, with expected days and volume required. For this, Connors would schedule refrigerated trailers; FFAF might not know at the time of scheduling what specific products would be in transit (or the number of required shipments), but would know their general nature. Connors had shipped live lobster for FFAF before; it makes up a high proportion of FFAF's local shipping. This, Milligan testified, was generally FFAF's highest value cargo aside from fresh tuna.

[9] Milligan stated he "likely" arranged for the transport which is the subject of this litigation, but could not recall specifically. He says he "probably" engaged Connors because "we built a long relationship" and "we don't use others unless Connors can't do it." He "probably" sent a forecast in October 2019, which is the subject of this dispute.

[10] In November 2019, FFAF engaged Connors to arrange for pick up and transport of lobster. Notably, there were no specific bills of lading between FFAF and Connors for this service. However, there is no dispute Connors knew that the

cargo was live lobster and that such transportation required a shipping temperature of between 2 and 4 degrees.[9]

[11] The lobsters were to be delivered to Quebec and Ontario for ultimate shipment to customers in France, Belgium, and South Korea. It is agreed that these shipments totalled an original estimated weight of 10,538 pounds, and the ultimate total was 10,588 pounds[10].

[12] On arrival, all shipments save one had varying degrees of damage due to low shipping temperatures, in some cases well below that which was appropriate. It was in evidence before me that many lobsters were dead and indeed some are encrusted in ice. Select sub-freezing crate temperature readings were in evidence before me. [11]

[13] Some spoilage or loss is to be expected. It was in evidence before me that this varies depending on a variety of conditions, outside of the parties' control. In particular, Mr. Milligan testified that the ambient water temperature at the time of fishing can affect transportation mortality, presumably as a knock-on from how robust the lobster was at the time of capture. 5% is something of an industry

[9] This is contained in the load confirmation between FFAF and Connors at Claimant's exhibit tab 5B; in any event, I have no difficulty finding that Connors knew what it was shipping and the need for specific levels of refrigeration; this is not in dispute.
[10] Agreed statement of facts, paragraphs 8 and 10.
[11] Claimant's exhibit 3A, Claimant's video exhibit 3G

accepted standard[12]. In the current case, the losses ranged from 0%[13] to 27.8%[14] to an apparent 100%.[15] It was not contested in any material way that this was a failure on the part of Connors. It was agreed that the total weight of damaged lobsters, in all four shipments, was 2,231.75 pounds.[16]

[14] FFAF, through its indemnitors, paid the losses (minus a deductible). The losses totalled some $21,703.86[17]. The total subrogated claim before the Court is to its monetary limit of $25,000. It is not clear to me what makes up the difference, but given my disposition it is not of import.

[15] Again, Connors did not materially contest that this loss was as a result of faulty temperatures in shipment. It did not adduce any evidence that someone outside its control affected the shipping temperatures. Instead, it relies upon its contractual and statutory limitations of liability. It says that if it has liability, it is calculated on the weight of the damaged goods, not the total shipped. It also says that the four destinations are separate shipments and so the limits apply to each of the four. FFAF says the statutory and contractual limitations do not apply or, in

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[12] Claimant's exhibit 1D refers to "in excess of allowable amounts," without saying what that is. Claimant's exhibit 2B refers to 5%.
[13] Agreed statement of facts, paragraph 9b
[14] Claimant's exhibit 3J
[15] Agreed statement of facts, paragraphs 8d and 9d.
[16] Agreed statement of facts, paragraph 9. One shipment, of 5000.08 pounds, was undamaged, while one was completely damaged. I note that this last shipment was the only one that had no air transport.
[17] Claimant's exhibit 4B

the alternative, apply to the total weight of the shipments. It also says there was but one shipment with four "stops," so if there is a limit, it applies to the total of 10,588 pounds (or the original estimate of 10,538 pounds, as the case may be).

ISSUES

[16] As I see it, the issues are:

1. Does the lack of a bill (or bills) of lading between FFAF and Connors remove any statutory or contractual limitation on liability?
2. If not, do either the $2.00 per pound limit or the complete exclusion of liability provisions for live lobsters contained in the limitation of liability between FFAF and Connors apply?
3. If the $2.00 per pound limit applies, does it apply to the total shipment, to the damaged portions, or to the total or insular amount of each of the four customers?
4. Is there one shipment or are there four?

ANALYSIS

The lack of a bill of lading

[17] As noted, Connors did not contest with any vigour that this loss occurred 'on its watch.' Instead, it sought to rely on various limitations or exclusions of liability.

[18] As a starting point, it sought to rely on Section 7 of the *Carriage of Freight by Vehicle Regulations*, NS Reg 24/95 (the "Regulations"). That regulation deems a uniform condition of carriage under every contract for carriage of freight, and shall be included in a bill of lading. The relevant section of that provision reads:

> 7. Except as otherwise provided by or under these regulations, the following clauses are prescribed as uniform conditions of carriage of freight by a motor carrier and are deemed to be part of every contract for the carriage of freight by a motor carrier and shall be contained or incorporated by reference in every bill of lading relating to the carriage of freight by a motor carrier:
>
> …
>
> **(e)** The motor carrier is not liable for
>
> **…**
>
> (ii) loss arising from
>
> …
>
> (C) deterioration of or damage to perishable food, plants or pets,
>
> …
>
> other than that due to the negligence of the motor carrier, the motor carrier's agent or employee, the burden ~~of~~ [of] proving absence of such negligence shall be on the motor carrier, [emphases added]

[19] FFAF argues that since there is no bill of lading in the case at bar, the exclusion does not apply.

[20] I agree. These are sophisticated parties. They know their regulated industry well. To paraphrase Margaret Thatcher, they like each other and can do business together. They have done so, repeatedly and mostly successfully. They have their ongoing relationship. They may consider a bill of lading to be 'too much paperwork' between themselves; they may be comfortable enough with the relationship to "know what the terms and conditions are;" but for whatever reason, they did not reduce this transaction to bills of lading. Instead, they relied on their own conduct rather than the regulatory regime. In doing so, they took themselves out of regulatory protections, insofar as the regulatory regime capped or limited liability for negligent errors or omissions. Connors, as the defaulting party, is estopped from setting up the lack of bills of lading as a defence.

[21] Section 9(1)(b)(viii) of the Regulations provides that the bill of lading must have a numerical code and, among other things

> a statement in conspicuous form to indicate that motor carrier's liability is limited by a term or condition of the applicable schedule of rates or by other agreement, [emphasis added]

[22] I will deal in due course with whether Connors is precluded from relying on the limitation of liability "by other agreement" by reason of a lack of a bill of

lading. For now, it is adequate to say that in my view, the specific exclusion of liability under Section 7 does not apply by reason of that omission. Parties may limit or exclude liability – by agreements that do not contradict any statutory regime or public policy – but a party may not rely on statutory limitations or exclusions when that regulatory regime sets out a condition precedent for such reliance – in this case, a bill of lading.

The contractual limitation of liability

[23] It will be recalled that the contract between Connors and FFAF limits Connors' liability to $2.00 per pound overall, and purports to exclude it completely in the case of "fish and lobster."

[24] At one time, exclusion clauses were interpreted using a rubric centred on the doctrine of fundamental breach. I am among the many who are eternally indebted to Justice Cromwell for concluding that "the time has come to lay this doctrine to rest," as indeed he did in *Tercon Contractors Ltd. v. British Columbia (Minister of Transport and Highways)*, 2010 SCC 4, at para. 62. Justice Binnie, dissenting in the result, said at para. 82:

> On this occasion we should again attempt to shut the coffin on the jargon associated with "fundamental breach". Categorizing a contract breach as "fundamental" or "immense" or "colossal" is not particularly helpful. Rather, the principle is that a court has no discretion to refuse to enforce a valid and applicable contractual exclusion clause unless

> the plaintiff (here the appellant Tercon) can point to some paramount consideration of public policy sufficient to override the public interest in freedom of contact and defeat what would otherwise be the contractual rights of the parties. Tercon points to the public interest in the transparency and integrity of the government tendering process (in this case, for a highway construction contract) but in my view such a concern, while important, did not render unenforceable the terms of the contract Tercon agreed to. There is nothing inherently unreasonable about exclusion clauses. Tercon is a large and sophisticated corporation. Unlike my colleague Justice Cromwell, I would hold that the respondent Ministry's conduct, while in breach of its contractual obligations, fell within the terms of the exclusion clause. In turn, there is no reason why the clause should not be enforced. I would dismiss the appeal.

[25] While the Court split 5-4 in the result, at least partly because of a divergence of views as to the the sophistication of the parties (a matter I have discussed in the present case), the Court unanimously formulated a "new and improved" three part test for the applicability and interpretation of an exclusion clause. It may be summarized as follows:

1. a determination as to whether the clause applies to the facts of the case;

2. a determination as to whether the clause itself is unconscionable (and thus invalid from the time the contract is made); and

3. if valid at the time the contract was entered into , whether the court should refrain from enforcing the clause because of some overriding public policy.

[26] There is no dispute that the clauses – either the $2.00 per pound or the complete exclusion for "fish and lobster" – apply to the case at bar (although there is a dispute, to be discussed, as to "$2.00 of what?").

[27] I believe, however, that these two limitations must be considered separately. I have no difficulty concluding that the $2.00 per pound (however that may be construed) is not unconscionable. The parties "sit at the adult table." They specifically turned their minds to it, over a period of months. Mr. Milligan sought and received specific permission to execute it. This is not a case of a consumer shipping Grandma's furniture after the funeral and, upset, signing whatever is required. The parties also specifically knew that Connors wanted this clause because it was standard operating procedure "with all our high value shippers." There is no question of unconscionability.

[28] I turn to public policy. In my mind, there is no public policy consideration to the $2.00 per pound limit, with one possible exception. I have discussed the bargaining parity of the parties already. The contract is private and consensual. It was addressed by intelligent people over a period of time. It was specifically inserted because of the "high value" of shipments that were the subject of the dealings between the parties. It is *not* "Grandma's furniture."

[29] The only public policy reason I can think of through which FFAF may be relieved of this limitation is the lack of a bill of lading. As noted above, Section 9 of the Regulations provides that the Bill of Lading must contain a conspicuous provision limiting liability "by any other agreement."

[30] I would be sympathetic to excluding a limitation of liability in the absence of a bill of lading in the case of one-offs or in the case of a substantial inequality of bargaining power, or in other cases in which the policy considerations noted in *Tercon* would apply. It could, in many cases, be unconscionable for a carrier to omit a bill of lading and then, faced with a claim, to say "it doesn't matter and the statutory requirement is without meaning."

[31] Turning to the case at bar. To use a good Nova Scotian expression, "that's different." In my view, when there is a course of dealing between the parties and "everyone knows what the contract is," it is not contrary to public policy to enforce that contract if (assuming it is otherwise not contrary to law) this is "just another one of the same type of contracts." In other words, everyone knew that the exclusion contract in place between Connors and FFAF – at least the $2.00 per pound part – was part of the overall deal between them, and would apply to FFAF's shipments.

[32] In the event I am wrong and the exclusion clause would only have effect in the event it was incorporated into each and every bill of lading – and that such bills of lading must be extant for each shipment for the limitation to apply to that shipment – I refer to *Anticosti Shipping v. St-Amand*, [1959] SCR 372. In that case, a unanimous Court upheld a limitation of liability on the grounds that

although there was no bill of lading, the shipper could have required it in what the Court termed an "ordinary transaction."

[33] In other words, this was just another shipment. Everyone knew the score. It was simply the first time that things went wrong.

[34] I therefore find that the limitation of "$2.00 per pound computed on the total weight of the shipment" applies, but for the possible override of the exclusion of "death or injury to live animals, birds, fish and lobster." To that, I turn.

[35] Once again, "that's different," when the purported complete exclusion of liability is viewed through the *Tercon* lens. I do not believe the "fish and lobster" provision is conscionable as between these parties in these circumstances. Fish and seafood shipments constitute substantially the whole business relationship between the parties. There is a similar exclusion for "deterioration of or damage to perishable food, plants or pets"[18] In combination, they would effectively say that Connors has no liability to FFAF, ever.

[36] That again may be something that competent parties of somewhat comparable or equal bargaining power may agree to. There is nothing saying they can't. However, in my view it is unconscionable to enforce the complete exclusion

[18] Claimant's Exhibit 6b, paragraph (ii)(C)

when (a) it effectively eliminates all liability, ever, by Connors to FFAF and (b) more importantly, it was subsumed in the discussion between the parties in which Connors indicated it was limiting its liability to $2.00 per pound, not exonerating itself completely. It will be recalled that Mr. Small's email concluded that "we are looking to be clear with all that Connors liability is $2.00/Lbs." It would be inequitable – unconscionable – for Connors now to say "that $2.00 per pound limit applies only to stuff you never ship with us even though we do business pretty much constantly, and the two dollars per pound is what we focused on because the business we do is for high valued goods."

[37] I therefore find that the $2.00 per pound limitation applies, notwithstanding the unfortunate but understandable lack of a bill of lading for this transaction. The complete exclusion of liability for "fish and lobster" does not.

$2.00 of what?

[38] It will be recalled that the wording of the limitation of liability refers to "$2.00 per pound calculated on the total weight of the shipment." [emphasis added]

[39] Each party urges what it respectively sees as a reasonable interpretation of that clause. FFAF urges that a reasonable interpretation of the plain wording

means “$2.00 per pound for every pound we gave them.” Connors argues that it means $2.00 per pound of things that were damaged.

[40] In argument, I presented the hypothetical of the Hope Diamond being shipped alone (distance and size of vehicle being equal), or being shipped along with a truckload of lead, and whether the amount being paid out if the bling goes astray is affected as a result of it being with or without its weighty base companion.

[41] On reflection, I agree that a reasonable interpretation is that the proper calculation is $2.00 of “everything.” I say that for four reasons.

[42] First, the plain and ordinary wording of the limitation is “total shipment.” If the parties meant to say “$2.00 per pound of goods lost or damaged,” they could have said so.

[43] Second, notwithstanding that this wording may have been ‘lifted’ from regulatory or statutory wording, it is a private contract with any ambiguity construed against the drafter, unlike a private contract which by statute is deemed to incorporate statutory wording (such as certain portions of residential leases or life or automobile insurance contracts). *Contra proferentum* applies.

[44] Third, and to return to my "Hope Diamond" example, the account for the contract of carriage would be considerably different if the King's Jewel was accompanied by a load of lead.[19] It only stands to reason that if the contract of carriage has a different value (in part) by reason of weight, the limit of liability by reason of weight should change accordingly, as at least some portion of the formula by which fares are calculated include differences in risk.

[45] Fourth, the interpretation of contracts which include or incorporate statutory language, or which are otherwise inclusive of 'boilerplate' language, can be questions of law: *Creston Moly Corp v. Sattva Capital Corp*, 2014 SCC 53. As such, as a matter of law, *contra proferentum* (discussed above) construes ambiguity against the drafter. For the reasons cited above, if there is any ambiguity here (and I do not believe there is) between "$2.00 per pound of what is damaged" and "$2.00 per pound of what was shipped," it cuts against Connors.

[46] I therefore find that the $2.00 per pound limitation applies to the total amount of each shipment.

What is the "shipment?"

[19] Apparently, Harry Winston sent the Hope Diamond through the mail to the Smithsonian Institute. No lead was included.

[47] Finally, I turn to the question of whether there was one, or more than one, shipment in place here.

[48] It was clear in evidence that the FFAF-Connors relationship is an ongoing and somewhat informal one. FFAF gives Connors a heads-up of what it expects to need in the ensuing month. The details get worked out *ad hoc*. In this instance, there were four customers, whose damage varied from nil to total. The weights varied from 870 to just over 5,000 pounds.

[49] FFAF argues that this is, in essence, one shipment with four stops and that I should calculate the limits accordingly. This has an initial attraction in that the limit of liability is constant regardless of destination or distance, and was part of the same 'load' as it were (in the sense that they were all commissioned as part of the same series of transactions – see Claimant's exhibit 5A).

[50] This initial attraction is bolstered by "the way these parties do business." FFAF gives Connors a heads up of what it expects to need, and the details are worked out later. However, it is perverse to think that there is a meaningful distinction between two loads that are picked up Monday and Tuesday, and two loads that are part of a consolidated shipment on Monday. The first, clearly, would

be limited by the weight of each. The second must be a distinction without a difference.

[51] It is noteworthy that one load was a complete loss, while another was undamaged. While I have found that the $2.00 per pound limit applies to what was shipped rather than what was damaged, it does not follow that the limit applies to one customer with different shipments of the same product.

[52] I therefore find that the monetary limits of liability are $2.00 per pound of each shipment. These follow.

[53] The shipments, and caps on liability, were:

Fishermen's Premium – 1,543.24 pounds x $2.00 per pound = $3,086.48

Fisherman's Market – 5,000.08 pounds x $2.00 per pound = $10,000.16

Cameron Seafoods – 3,174.66 pounds x $2.00 per pound = $6,349.32

Ocean Miracle – 870 pounds x $2.00 per pound = $1,740.00

[54] The losses were:

Fishermen's Premium – 343.37 pounds

Fisherman's Market – none

Cameron Seafoods – 1,018.38 pounds

Ocean Miracle – 870 pounds

[55] The monetary calculations that result are:

Fishermen's Premium – loss of $3,947.61[20] – limitation of liability = $3,086.48 (1543.24 pounds total @ $2.00 / pound)

Fisherman's Market – none

Cameron Seafoods – loss of $12,536.25[21] – limitation of liability $6,349.32 (3,174.66 pounds total @ $2.00/pound)

Ocean Miracle – loss of $5,220.00[22]– limitation of liability $1,740.00 (870 pounds total @ $2.00/pound)

[56] The total, as limited, is $11,175.80. I award this amount.

[57] I am not reducing damages to reflect any 'industry standard' for expected losses or death in transit. It was not in evidence before me whether it is an industry

[20] Claimant's Exhibit 3A
[21] Claimant's Exhibit 2A
[22] Claimant's Exhibit 1A

standard to claim for such losses, whether it is already ‘baked into’ the price of the goods with the expectation that some will be D.O.A, or whether some other protocol applies.

[58] I invite counsel to come to agreement on prejudgment interest, which I am prepared to award under Regulation 16 of the *Small Claims Court Forms and Procedures Regulations*, NS Reg. 17/93 as amended, and costs. Failing agreement, I shall hear them briefly by written submission to be exchanged and filed no later than December 15, 2020.

[59] Mr. Onderwater is to prepare the order for my review upon such agreement, or with submissions. Ms. Schigas is to indicate her consent, or dissent, as to form and content.

[60] I add a final comment. Both counsel are comparatively new to our bar. Both represented their clients diligently and with resolution. Both worked to put forward agreed facts which considerably abbreviated the necessity of formal proof and expedited the proceedings. Both treated each other, the witness, and the Court with utmost courtesy and professionalism. Both provided informative and cogent written and oral argument, and acquitted themselves well in responding to questions from the bench. Both counsel have the Court’s gratitude and best wishes

in this challenging environment for what I expect will be promising and fulfilling careers.

Balmanoukian, Adj.