Date: 19980511
Docket: C972706
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY

PETITIONER

AND:

SOUTHERN RAILWAY OF BRITISH COLUMBIA LTD.

RESPONDENT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE SINCLAIR PROWSE

Counsel for the Plaintiff:	B.T. Quayle
Counsel for the Defendant:	S.F. Lee
Place and Date of Hearing:	November 6, 1997 and January 20, 1998 Vancouver, B.C.

I) Nature of Action and Relief Sought

[1] In January 1991, the petitioner Canadian National Railway Company (CNR) and the respondent Southern Railway of British Columbia Ltd. (Southern) entered into a written contract with Johnson & Johnson Inc. Pursuant to the terms of this contract, CNR and Southern agreed to transport goods belonging to Johnson & Johnson Inc. from Quebec to British Columbia - CNR having agreed to transport the goods from the Johnson & Johnson distribution centres in Quebec to their centres in Alberta and Southern having agreed to transport the goods from their distribution centres in Alberta to their distribution centres in British Columbia.

[2] While being transported pursuant to this contract, the goods were destroyed by fire.

[3] Subsequently, pursuant to a settlement CNR paid Johnson & Johnson Inc. $160,629.13 (U.S.) as compensation for the full loss of these goods.

[4] Following this payment, pursuant to the terms of the agreement between the parties, an arbitration committee appointed by the Association of American Railways (the AAR Arbitration Committee) concluded that Southern was fully responsible for the loss.

[5] After this finding, Southern paid CNR $83,788.00 (U.S.) plus the arbitration fee but has refused to pay the

balance of the amount paid by CNR to Johnson & Johnson Inc. although CNR has requested that it do so.

[6] In this application, CNR is seeking a declaration that it is entitled to be re-imbursed for the full amount of the monies that it (CNR) paid to Johnson & Johnson Inc. and for judgment against Southern in the amount of the outstanding balance of that payment in Canadian dollars.

II) Issues

[7] There were a number of issues raised in this hearing - namely,

A) Should this action be struck on the basis that CNR is out of time pursuant to the provisions of the ***Limitation Act***?

B) Should this court refuse to recognize and/or enforce the decision of the AAR Arbitration Committee pursuant to the provisions of either the ***International Commercial Arbitration Act*** or the ***Foreign Arbitral Award Act*** - specifically, on the basis of jurisdictional error and/or breach of natural justice?

C) Should this action be dismissed on the grounds that the liability of the parties to Johnson & Johnson for their loss was limited to $2.00 per lb, leaving no further monies owing to CNR?

D) Has CNR proven that it is entitled to the relief sought in this action?

II) Discussion and Decision

[8] For the reasons that follow, I have concluded that CNR is entitled to the relief that it seeks in this Petition.

A) Should this action be struck on the basis that CNR is out of time pursuant to the provisions of the ***Limitation Act***?

[9] With respect to this submission, Southern argued that this was an action arising from property loss. Therefore, pursuant to the provisions of the ***Limitation Act*** this action was subject to a limitation period of two years. Southern contended that as the loss was incurred at the time of the fire which was on or about the January 20, 1991, the limitation ran out on the January 20, 1993 - some time prior to the commencement of this action on the May 8, 1997.

[10] Further, Southern argued that even if the court should find that the payment by Southern in July 1994, constituted a confirmation of the action, the limitation period had expired in any event in July 1996, well before the commencement of the present action.

[11] In my view, this submission of Southern is unsound because it is based on a wrong premise. Although the cause of action of Johnson & Johnson Inc. was for property damage, the cause of action of CNR is not for property damage but rather is for debt arising from a breach of the agreement between it and Southern to observe and comply with the ***AAR Freight Claim Rules*** (that is, a breach of contract).

[12] The AAR Arbitration Committee found Southern to be solely liable for the loss suffered by Johnson & Johnson Inc. on or about the January 31, 1994. CNR made a demand to Southern for the payment of the monies paid by it to Johnson & Johnson Inc.

[13] On or about March 7, 1994, Southern refused to pay the full amount and, as has been set out earlier in this judgment, has only repaid a portion of the monies paid to Johnson and Johnson Inc.

[14] In the present action, the claim of CNR is that it had agreed with Southern to observe and comply with the ***Rules***

of Order, Principles and Practice, Freight Claim Rules of the Damage Prevention and Freight Claim Section of the American Association of Railroads (AAR Freight Claim Rules); that pursuant to those rules, Southern had been found to be solely liable for the loss of the Johnson & Johnson Inc. goods; that as a consequence of that finding Southern was indebted to CNR for that loss; and that Southern's refusal to pay the full amount of the monies owing constituted a breach of their agreement.

[15] As the limitation period for breach of contract is six years; as the alleged breach did not arise until March 1994; and as this action was commenced on the May 8, 1997, this action is not barred by the provisions of the ***Limitation Act*** as the limitation period had not expired when this action was commenced.

B) Should this court refuse to recognize and/or enforce the decision of the AAR Arbitration Committee pursuant to the provisions of either the ***International Commercial Arbitration Act*** or the ***Foreign Arbitral Award Act*** - specifically, on the basis of jurisdictional error and/or breach of natural justice?

[16] Southern argued that pursuant to the provisions of the ***International Commercial Arbitration Act*** and/or the ***Foreign***

Arbitral Award Act this court should refuse to recognize and/or enforce the decision of the AAR Arbitration Committee on the basis of jurisdictional error and/or breach of natural justice.

[17] There is no dispute that under the provisions of both of these statutes this court *may* refuse to recognize or enforce a decision of an arbitral award on either of these grounds.

[18] For the reasons which follow, however, I have concluded that there was neither a jurisdictional error nor a breach of natural justice in the proceedings conducted by the AAR Arbitration Committee.

1) <u>The jurisdictional error submission</u>

[19] As has been touched on previously in this judgment, the arbitration between the parties was conducted pursuant to the provisions of the ***AAR Freight Claim Rules***, the parties both being full members in good standing of the AAR.

[20] Southern argued that under the Rules of Order VIII of the ***AAR Freight Claim Rules***, if the Arbitration Committee is given more than one issue to decide and it does not have the authority to decide all of the issues "there shall be no arbitration under these rules."

[21] Southern contended therefore that the AAR Arbitration Committee was without jurisdiction because it was asked to decide two issues (namely, the apportionment of liability and the limitation of liability) and it ultimately decided that it did not have the authority to decide the second issue. Therefore, as the AAR Arbitration Committee did not have the authority to decide the second issue, it did not have the authority to decide the first issue.

[22] The pivotal issue with respect to this argument is whether the AAR Arbitration Committee was asked to decide one or two issues. In my view, it was asked to decide one issue.

[23] To put this issue in context, it is essential to understand the surrounding circumstances.

[24] There is no dispute that the Johnson & Johnson Inc. goods were lost while in the possession of Southern. However, Southern claimed that the fire had started before the goods came into their possession and that CNR was wholly responsible.

[25] To resolve this issue, on or about June 23, 1993, CNR commenced the arbitration procedure by invoking the arbitration provisions of the ***AAR Freight Claim Rules***. After the appointment of the AAR Arbitration Committee, written submissions were made by both parties.

[26] In their written submissions, CNR addressed the only issue that it had raised on invoking the arbitration, namely whether it was at all liable for the loss of these goods. Southern, on the other hand, in its written submissions raised the issue of limited liability.

[27] In its decision, the AAR Arbitration Committee was split on the issue of CNR's liability - four of the five members deciding that the evidence did not prove that the fire started when the goods were in the possession of CNR and that as the goods were in the possession of Southern at the time of the actual loss, Southern was considered to be solely liable. The fifth member of the AAR Arbitration Committee decided that both CNR and Southern were equally liable.

[28] As is disclosed in each of their reasons, the majority of the members of the AAR Arbitration Committee identified the apportionment of liability as the only issue and consequently addressed only it. In his reasons for judgment, the chairman of the AAR Arbitration Committee wrote "[t]he only question to be resolved is whether the findings of J.A. Kennedy and Associates, the independent fire expert, establishes negligence with the car owner, the Canadian National."

[29] The fifth member of the AAR Arbitration Committee did, however, identify the limitation issue as being an issue raised in this arbitration but concluded that she could not

render a decision on this issue because the evidence submitted was insufficient.

[30] Subsequent to the rendering of this decision, Southern sought to have the AAR Arbitration Committee re-open the arbitration and decide the limitation of liability issue. Upon consultation with their legal counsel, the AAR reported to Southern in a letter dated August 28, 1995, that an issue "as to whether a contractual limitation of liability applies ... is precisely the type of liability provision that Rule of Order VIII prohibits AAR from interpreting".

[31] Upon considering the submissions of counsel and the material tendered in evidence in this hearing, I have concluded that there was only one issue before the AAR Arbitration Committee and that that was the issue of the apportionment of liability between CNR and Southern, an issue that was within their jurisdiction to hear.

[32] In my view, given that four of the five members of the AAR Arbitration Committee did not recognize that this second issue had even been raised, although it may have been mentioned in the submission of Southern, it could not have been identified clearly enough or pursued seriously enough to constitute a second issue. The members of the AAR Arbitration Committee had no reason to ignore this second issue if they had recognized it as being raised. As the correspondence

discloses, it was not immediately obvious to anyone that the AAR Arbitration Committee did not have the authority to decide it in any event.

[33] However, if I am wrong and there were two issues before the AAR Arbitration Committee, I have concluded that it would not be appropriate for me to exercise my discretion and refuse to recognize or enforce this arbitral award. Certainly, the AAR Arbitration Committee had the jurisdiction to decide the issue of the liability of CNR had it been the only issue before them.

[34] As the second issue is now before me to be decided, Southern has not been prejudiced in the sense of forever being precluded from raising the second issue.

2) <u>The breach of natural justice submission</u>

[35] Southern has also argued that this court should refuse to recognize or enforce the arbitral award on the basis that the materials before the AAR Arbitration Committee were incomplete (namely, Confidential Contract No. 00435 which was the agreement between the parties and Johnson & Johnson Inc. had not been included); that the AAR Arbitration Committee did not address all of the issues raised as is required by the ***AAR Freight Claim Rules*** which governed the arbitration; and/or that

a majority decision was not given by the AAR Arbitration Committee as required by the ***AAR Freight Claim Rules***.

[36] Pivotal to the resolution of this issue is the identification of the issues that the AAR Arbitration Committee were asked to determine. As was set out in the preceding section, the only issue to be determined by them was the question of liability and more specifically, as the chairman wrote "[t]he only question to be resolved is whether the findings of J.A. Kennedy and Associates, the independent fire expert, establishes negligence with the car owner, the Canadian National."

[37] Given this situation, the evidence falls short of establishing that there was a breach of natural justice as Confidential Contract No. 00435 was not relevant to the issue before the AAR Arbitration Committee and therefore its omission did not render the committee's materials incomplete; as the AAR Arbitration Committee did address the only issue that was raised; and as four out of the five members of the AAR Arbitration Committee agreed on the final decision, a majority decision was reached.

C) <u>Should this action be dismissed on the grounds that the liability of the parties to Johnson & Johnson Inc. for their loss was limited to $2.00 per lb, leaving no further monies owing to CNR</u>?

[38] When Johnson & Johnson Inc. delivered its goods to the parties to be transported to their various distribution centres, it (Johnson & Johnson Inc.) provided the parties with a list of their goods set out on a pre-printed bill of lading form.

[39] Included in this pre-printed form were two boxes positioned one above the other. In the upper box was printed valuation $2.00 per lb. In the lower box was printed "Declared Value of Ship". (Because an understanding of this form is fundamental to the resolution of this issue, a copy of the form has been attached to this judgment and marked Appendix A.)

[40] With respect to the completion of this form, both of these boxes were left unmarked. Neither party signed this document.

[41] Southern contended that pursuant to this bill of lading, Johnson & Johnson Inc. had limited the liability of the parties regarding the loss of the transported goods to $2.00 per lb.

[42] Although there was no dispute that a bill of lading may set out the terms of the contract between the parties, there was also no dispute that it may not be binding if it is given out of the usual course of business and does not accurately reflect the terms of a prior agreement: ***The North-***

West Transportation Company v. F.B. McKenzie (1895), 25 S.C.R. 38 and ***Saint John Shipbldg. & Dry Dock Co. v. Kingsland Maritime Corp*** (1981), 126 D.L.R. (3d) 332 (Fed. C.A.).

[43] Pursuant to Clause 5 of the Confidential Transportation Contract No. 00435 (which was the contract between the parties and Johnson and Johnson Inc.), "Except as otherwise provided in any schedule to this Contract, the liability of Carriers for any alleged loss, damage or delay to the Commodity shall be identical to the standards imposed on a Canadian common carriers as defined in Section 153, NTA, National Transportation Act, 1987". There was no schedule attached to this contract.

[44] The standards set by the S. 153 of the ***National Transportation Act 1987*** S.C. 1987 c. 34, regarding the liability of the carriers (which the parties were) is as follows:

> 1) A railway company shall not limit or restrict its liability to a shipper in respect of the transportation of traffic of the shipper otherwise than by means of a written agreement signed by the shipper or by an association or other body representative of shippers.
>
> 2) In the absence of an agreement referred to in subsection (1), the extent to which a railway company's liability may be limited or restricted in respect of any traffic and the terms and conditions of the limitation or restriction shall be such

> (a) as the Agency, by order, on the application of the company, may specify in respect of that traffic; or
>
> b) as are prescribed, where no order under paragraph (a) has been made in respect of that traffic.

[45] The Agency refers to the National Transportation Agency. In this case, there had not been an application to it and therefore the contract between the parties and Johnson & Johnson Inc. was governed by the ***Railway Traffic Liability Regulations*** SOR/91-488, which provide as follows:

> S. 3 These Regulations do not apply where a carrier's liability is limited by a written agreement signed by a shipper or by an association or other body of representative of shippers, or by any other regulations, including any order made by the Canadian Transport Commission before the coming into force of the applicable provision of the Act.
>
> S. 11 The amount of any loss of or damage to goods for which a carrier is liable in respect of the transportation of the goods shall be the lesser of the value of the goods at the place and time of shipment, including freight and other charges that affect the valuation of the goods, if paid, and the customs duties if paid or payable and not refundable, and
>
> a) the value represented in writing by the shipper,
>
> b) the value agreed by the carrier and the shipper, or
>
> c) the value determined in accordance with the tariff classification of the goods on which the rate is based.

[46] The conclusion to be drawn from these interrelating provisions is that Johnson & Johnson Inc. are entitled to the full amount of their loss unless there was an agreement reached by it and the parties limiting the parties' liability to less than the full amount. Applied to the circumstances of this case, the issue is whether the bill of lading constitutes a subsequent agreement which limits the liability of the parties to $2.00 per lb. - namely, $83,788.00 (U.S.).

[47] There was no dispute that evidence of the circumstances surrounding the making of a purported contract are admissible to interpret that contract: ***Ahluwalia v. Richmond Cabs Ltd.*** (1995), 13 B.C.L.R.(3d) 93 (C.A.). Further, there is no dispute the court in considering the extrinsic circumstances surrounding the making of a contract will avoid an interpretation that results in a commercial absurdity ***Toronto (City) v. W.H. Hotel Ltd.***, [1966] S.C.R. 434.

[48] In this hearing, CNR led evidence regarding the bill of lading form used by Johnson & Johnson Inc. All of the provinces, save and except Prince Edward Island, have passed legislation prescribing certain forms of bill of lading which are to be used in relation to motor carrier cargo transport. Pursuant to that legislation, these prescribed forms set out that the liability of the motor carrier is limited to $2.00 per lb. unless the shipper takes steps to declare a greater value. As a matter of convenience, Johnson & Johnson Inc. also used

the same form of bill of lading when transporting its goods by rail.

[49] In this case, there was no dispute that the box containing the $2.00 per lb was part of the pre-printed bill of lading form rather than information that had been inserted by the shipper Johnson & Johnson Inc. at the time that the form was presented with the goods to be shipped. Further, there was no dispute that this document was simply presented with the goods. That is, there was no discussion between the carriers (the parties) and Johnson & Johnson Inc. about changing the terms of the existing contract to reduce the liability of the carrier to Johnson & Johnson Inc. to $2.00 per lb.

[50] Upon considering these surrounding circumstances, including the absence of any discussion with respect to a limitation of liability and the lack of any consideration, I have concluded that this bill of lading is not a new agreement varying the terms of the existing contract. Rather, I have concluded that this bill of lading was no more than a record of the goods to be transported. In my view, to interpret the Bill of Lading as suggested by Southern twists the facts and results in a commercial absurdity.

[51] Therefore, the bill of lading used in this case did not limit the liability of the parties to $2.00 per lb. Rather the liability of the parties was for the amount as agreed in

the contract between them and Johnson & Johnson Inc. - namely, the full amount of the loss.

D) Has CNR proven that it is entitled to the relief sought in this action?

[52] As was set out in the preceding section of this judgment, pursuant to the terms of the contract between the parties and Johnson & Johnson Inc., Johnson & Johnson Inc. was entitled to be compensated for the full value of the loss of their goods.

[53] As was also set out earlier in this judgment, the parties were bound by the terms of the agreement that they had with each other and in particular that they would follow the ***Freight Claim Rules***. As a consequence of the operation of these provisions, the AAR Arbitration Committee concluded that Southern was fully liable for the loss. This decision was not appealed.

[54] Therefore, as a result of the operation of the agreement between parties, Southern is responsible to CNR for the repayment of the full value of the loss to Johnson & Johnson Inc. - namely, $160,629.13 (U.S.). As Southern has paid CNR $83,788.00 (U.S.) towards that loss, Southern owes CNR $76,841.14 (U.S.) converted to Canadian dollars, plus interest.

[55] Specifically, CNR is granted a declaration setting out that it is entitled to be paid for the full amount of the monies that it paid Johnson & Johnson Inc. for the loss of its goods and further, CNR is granted judgment against Southern for the amount in Canadian dollars of $76,841.14(U.S.) calculated at the exchange rate at the time that CNR paid the monies to Johnson & Johnson Inc. plus interest for the period extending from the date of payment until the date that this judgment is released.

V) Costs

[56] As the successful party, the Petitioner is awarded the costs of this action, the Scale of those costs being set at Scale 3.

"Sinclair Prowse, J."

Vancouver B.C.
May 11, 1998