BRITISH COLUMBIA ADMIRALTY DISTRICT

Victoria 1965 Nov. 30 Dec. 1 Dec. 7

BETWEEN:

GOLDCO IMPORTS LIMITED .....PLAINTIFF;

AND

THE SHIP *MEITOKU MARU*, MITSUI STEAMSHIP CO. LTD. and THE OWNERS AND CHARTERERS OF THE SHIP THE *MEITOKU MARU*. . . .DEFENDANTS.

Shipping—Goods damaged in carriage—Liability of carrier—Proof of damages—Quantum of damages—Salvage offer—Whether required to be accepted—Onus of proof—Mitigating circumstances.

Cartons containing ladies' handbags purchased by plaintiff in Japan and carried by defendant ship to Vancouver were found to be crushed on arrival. Plaintiff had the cartons shipped unopened to Toronto where they were unpacked. It was found that 80% of the handbags could be repackaged at a cost of $894 for labour and $437 for boxes, but 20% were too badly damaged to be salable to plaintiff's ordinary customers, the large retail department stores. Plaintiff was offered a total of $3,751 by a salvage dealer for these bags, whose ordinary value, had they not been damaged, was $16,261. Plaintiff rejected the offer and destroyed the bags in the belief that placing the damaged handbags into trade channels would have an adverse effect on its business reputation, injure relations with its regular customers, and give rise to claims in respect of the damaged bags which as a business matter it would be unable to resist. Plaintiff did not however know anything about the salvage business and made no inquiries to ascertain whether the salvage sale could be made on conditions that would have avoided the above consequences.

Held: 1. It was not the act of a reasonable and prudent businessman to reject the offer of $3,751 for the damaged bags without inquiry as to the possibility of damage to plaintiff's business, and this sum must therefore be deducted from the damages to which plaintiff was otherwise entitled.

2. When a carrier delivers goods in a damaged state the damages recoverable are the difference between the net amount which could be

realized if the goods were sound and the net amount which could in fact be realized in the open market. *Wertheim v. Chicoutimi Pulp Co.* [1911] A.C. 301, per Lord Atkinson at p. 307, applied. Thus in this case plaintiff was entitled to be reimbursed (1) the cost of repackaging the bags which were undamaged, and (2) the difference between the amount plaintiff could have received for the badly damaged bags, *viz* $16,261, and the amount offered for them by the salvage dealer, *viz* $3,751.

3. The onus is on the consignee claiming for damage sustained by goods through the fault of a carrier to establish the extent of his loss, and there is no onus on the carrier to prove mitigation. The matter should however only be decided on the basis of onus in the absence of evidence. *Government of Ceylon v. Chandris* [1965] 3 ALL E.R. 48 per Mocatta J. at pp. 56-7, applied.

ACTION for damages.

W. J. Wallace for plaintiff.

J. I. Bird, Q.C. for defendant.

JACKETT P.:—This is an action for pecuniary loss flowing from physical damage caused to goods belonging to the plaintiff while they were being carried from Kobe in Japan to Vancouver on the ship *Meitoku Maru* under Bills of Lading issued by Mitsui Steamship Co. Ltd.

The goods consisted of ladies' handbags of a kind that the plaintiff had been, for some time, in the course of its business, purchasing in Japan, importing into Canada and selling to well known retail stores such as Eaton's, Simpsons, Birks, Hudson's Bay and Woodward's. The bags were packed in cartons. Each carton contained a number of bags. There were two separate shipments: one from Dodwell & Company, Limited of Osaka Japan, and the other from Sato Shun & Co. Ltd. of Kobe, Japan. Dodwell shipped 164 cartons and Sato Shun shipped 281 cartons. For the purposes of this judgment, all the cartons may be thought of as a single shipment.

Each Bill of Lading provided for the goods being carried to Vancouver. There was, however, on each Bill of Lading an indication that the ultimate destination was Toronto.

When the goods were unloaded at Vancouver, all, or practically all, the cartons had been "crushed". The "Reconditioning Over and Short Report", in each case, described the cartons when received from the ship as "crushed contents intact". The cartons were, nevertheless, shipped, unopened, by rail from Vancouver to Toronto.

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Upon arrival in Toronto, the cartons were unpacked and it was found that approximately 80 per cent of the bags could be sold by the plaintiff to its ordinary customers after replacing the paper stuffing in them and re-boxing them. The remaining 20 per cent of the bags had been crushed in such a way that they could not be restored sufficiently to be sold to the plaintiff's ordinary customers.

The plaintiff received an offer of 55¢ per bag, or $3,751.55, from a salvage dealer for the bags that were damaged too much to be reconditioned for sale to its ordinary customers. It decided, however, that it would not accept such offer. Instead it destroyed them. Indeed, it negotiated an arrangement with its insurer whereby it accepted a reduction in its insurance claim of 57½¢ per bag, or $3,880.68, in lieu of allowing the insurance company to have the bags as salvage.

At the opening of the trial, counsel for the defendants conceded "the issue of liability" and put the plaintiff to the proof of physical damage to the contents of the cartons and of the pecuniary loss flowing therefrom.

It was not seriously disputed by counsel for the defendants, after hearing the evidence, that the plaintiff had established that the value to the plaintiff in Toronto of the bags that were damaged during the voyage from Kobe to Vancouver, through the crushing of the cartons, (other than those that could be restored sufficiently so that they could be sold to the plaintiff's ordinary customers) would, if they had arrived in Toronto undamaged, have been $16,426.01 less 1 per cent thereof or $164.26 (having regard to its record of damage claims) or a net amount of $16,261.75.

It was conceded by counsel for the defendants during argument that the plaintiff's evidence had established that the plaintiff was entitled to be compensated for the cost of putting the undamaged bags into shape for delivery to customers, such cost being $893.77 for extra labour required and $437 for new boxes required to re-box such bags.

From these amounts of

value	$16,261.75
labour	893.77
boxes	437.00
totalling	$17,592.52

the defendants, claim that there must be deducted, to establish the plaintiff's pecuniary loss resulting from the physical damage to its goods,

(*a*) an amount of $575.38, which, according to the defendants, is the amount of a rebate of duty obtained from the Customs authorities in respect of the damaged goods,

(*b*) an amount of $3,751.55, being the amount for which the plaintiff could have sold the damaged goods to the salvage dealer, and

(*c*) an amount of $500.00 being the part of the cost of bringing all the goods from Vancouver to Toronto that is attributable to the damaged goods.

I find that it has not been established that the plaintiff did obtain, or could have obtained, any rebate of Customs duty, and I reject the defendants' contention that there should be a reduction of $575.38 with regard thereto.

With regard to the amount of $3,751.55, for which the plaintiff could have sold the damaged hand bags to a salvage dealer, the plaintiff's explanation of its decision to destroy the bags instead of realizing this amount is, in effect, that it was its business judgment that if it put the damaged handbags into trade channels it would have an adverse effect on its business that would outweigh the proceeds from the salvage sale. The evidence is that each bag had a label in it that showed the plaintiff's trade name in combination with an indication that the place of origin was Japan and that there was a legal requirement that the labels showing the foreign place of origin remain attached to the bags. The evidence is further

(*a*) that the plaintiff, as a matter of business policy, did not sell damaged goods and that, in its opinion, it would damage its business reputation if goods of the kind in question, of which it was a principal, if not the sole, distributor in Canada, were sold in a damaged condition with its trade name in them,

(*b*) that, in its opinion, it would damage its relations with its regular customers if such damaged goods were allowed to reach the public through second rate stores, and

(*c*) that, in its opinion, if they did reach the public, it would become subject to claims in respect of the

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damaged bags, which as a business matter it would be unable to resist.

In the absence of other evidence, I should have been inclined to reach the conclusion that the plaintiff's decision not to sell the damaged goods to the salvage dealer was a reasonable and prudent decision in the circumstances. The plaintiff's evidence as to the importance of these considerations from its point of view was not shaken, if indeed it was seriously challenged, on cross-examination. However, all these factors operated on the plaintiff's judgment because it was of the view that, if the salvage dealer had acquired the damaged bags, they "might have gone" to "sub-standard" stores who would sell them to the general public. Moreover, the plaintiff's evidence shows that it did not know anything about the salvage business, it did not know what disposition would have been made by the salvage dealer of the damaged bags and it made no inquiries to ascertain whether the salvage sale could be made subject to conditions that would have protected the plaintiff from the consequences that it apprehended. In my opinion, it was not the act of a reasonable and prudent business man to reject the possibility of salvaging an amount of $3,751.55 without any inquiry as to the possibility of doing so without serious danger of damage to its business and I so find.

I hold, therefore, that the amount of $3,751.55 must be deducted from the damages otherwise recoverable by the plaintiff.

With regard to the defendants' claim that there should be deducted from the damages otherwise recoverable $500.00 in respect of the cost of transporting the damaged goods from Vancouver to Toronto, I am inclined to the view that this proposed deduction disappears in the light of my disposition of the salvage item. There is no evidence to indicate that there would have been any possibility of developing a salvage sale if the damaged goods had been separated from the undamaged goods in Vancouver and only the undamaged goods had been shipped to Toronto. In any event, in the absence of some evidence to the contrary of which there is none, I am of opinion that the reasonable and prudent thing to do, when the checkers reported that the external cartons were crushed but the contents were intact, was to forward the cartons to the ultimate destina-

tion where the consignee would almost certainly be better able to form a judgment as to how best to deal with the matter rather than to employ somebody in Vancouver to open the cartons and to make a decision on behalf of the plaintiff as to what should be done. In coming to this conclusion I have in mind that it subsequently appeared that only 20 per cent of the total contents were seriously damaged and I infer from that that the condition of the cartons was such as to indicate that a substantial part of the contents was probably in good order.

There will therefore be judgment for the plaintiff for $13,840.97, being $17,592.52 less the unrealized salvage in the sum of $3,751.55.

I should add something, in view of the argument for the plaintiff, with reference to the legal principles applicable to the determination of the pecuniary loss suffered by the plaintiff as the result of delivery by the carrier of goods in a damaged state.

The general principle, as I apprehend it, is as stated by Lord Atkinson in *Wertheim v. Chicoutimi Pulp Company*[1], where he said "... it is the general intention of the law that, in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed:". In determining what amount is required to achieve this end where there is a breach of a contract of carriage by failure to deliver goods in accordance with the contract, market value of the goods at the appropriate time and place is one of the most significant factors because, as Lord Atkinson said in the same judgment, "it is presumed to be the true value of the goods to the purchaser". In cases where the goods are not delivered because they have been destroyed, market value may be the measure of the loss. Where the breach consists in a failure to deliver at the contract date, the measure of the loss may be the difference between the value at the time when the goods should have been delivered and the value when they were actually delivered. This will not always be so as appears from the judgment of Lord Atkinson in *Wertheim v. Chicoutimi Pulp Company, supra,* at p. 309. Where, however, a carrier delivers goods in a

[1] [1911] A.C. 301 at 307.

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damaged state, I am of the view that the correct rule is as stated in Carver's "Carriage of Goods by Sea" 9th Ed. at p. 1047, where it is put that "the comparison is between the net amount which could be realized... if sound, and the net amount which could in fact be realized in the open market". Compare *Government of Ceylon v. Chandris*[1] per Mocatta J. at pp. 56-7.

This latter rule is the rule that I have endeavoured to apply in this case. Had the total shipment arrived undamaged, it would have had a value to the plaintiff in some amount that I need not determine. In view of the damaged condition of the shipment as a whole, before the plaintiff could dispose of the undamaged bags, which constituted 80 per cent of the total contents, it had to expend $893.77 for extra labour and to use new boxes that cost it $437, which amounts it would not have had to expend if the cartons had been discharged from the ship undamaged. Secondly, the plaintiff could realize from the remaining 20 per cent of the contents in their damaged state only $3,751.55 instead of $16,261.75, which is the net amount that the plaintiff could have realized from such goods if they had not been damaged. Such 20 per cent of the contents were therefore worth $12,510.20 less than they would have been worth if they had not been damaged. The total shipment in its damaged state had therefore a value that was less than the value that it would have had if it had not been damaged by an amount equal to the aggregate of those amounts, viz:

labour	$ 893.77
boxes	437.00
depreciation in goods that were damaged	12,510.20
	$ 13,840.97

I cannot accept the argument of counsel for the plaintiff, as I understand it, that a consignee is entitled, in the case of damaged goods, to the market value that the goods would have if they were undamaged subject to any "mitigation" and that the onus of establishing "mitigation" is on the carrier. None of the authorities cited by counsel for the plaintiff for that proposition, as I read them, relates to physical damage occasioned to goods while in the hands of a carrier. In my view, the onus is on the consignee claiming for damage sustained by goods through the fault of a

[1] [1965] 3 All E.R. 48.

carrier to establish the extent of his pecuniary loss arising from the damage for which the carrier is responsible, but the matter should only be decided on the basis of this onus of proof if there is no evidence upon which a finding can fairly be made. In this connection, I respectfully adopt that portion of the judgment of Mocatta J. in *Government of Ceylon v. Chandris, supra,* where, in discussing how an arbitrator should dispose of a question as to the amount that the charterers in that case could recover from the owner of the ship when it had been established that the damage to the cargo was in part due to breaches of contract by the charterers and in part to breaches of contract by the owner of the ship, he said at p. 57: "... the burden of proof rests on the claimants to prove the damages to which they are entitled over and above nominal damages. The umpire should also remember that he is entitled, like any tribunal, to draw inferences from primary facts. Only if, after the most careful consideration of the primary facts proved, he finds it impossible to draw any fair inference as to the quantity of damage caused by the claimants' breach or breaches of contract or by the respondent's breach of contract, should he finally fall back on the law as to the burden of proof as indicated above."

Counsel for the plaintiff relied on his submission as to the state of the law for the sole purpose of throwing on the defendants the onus of establishing that the plaintiff should, as a reasonable and prudent man of business, have sold the damaged goods to the salvage dealer, which onus, he submitted had not been discharged. On my view of the evidence, it was clearly established that the plaintiff did not take the steps that a reasonable and prudent man of business would have taken before deciding to destroy the damaged goods rather than to sell them.

Counsel for the defendants agreed that the judgment should include interest on the amount of the damages awarded at the rate of 4% per annum from the date of delivery and counsel for both parties agreed that this should be taken to be January 22, 1962.

The plaintiff will, therefore, have judgment in the sum of $13,840.97, with interest thereon at 4% per annum from January 22, 1962 to the date of judgment, and for its costs of the action to be taxed.