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THE NAVIGATOR

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Cargo Claims - Five Common Mistakes You Should Avoid

So – you just received a shipment of bananas that arrived overripe, did you? Or maybe you just took delivery of a load of butter that arrived melted? Or your computers arrived with their screens scratched? Your load of t-shirts arrived smelling musty and mouldy? Your grape juice shipment fermented in the container?

Sounds like you may have a cargo claim on your hands.

Unfortunately, you're not alone. Cargo claims happen all the time, and, given the amount of shipping that takes place in the world today, they are bound to keep happening. The "good news" is that most cargo claims are made and settled with a minimum of fuss; however, there are nonetheless some common mistakes made by potential claimants and plaintiffs that make it harder for them to recover against a loss. Here are five common mistakes that should be avoided by those who wish to pursue a cargo claim.

Failure to Preserve Evidence

Failing to preserve all of the evidence relevant to the cargo claim is easily the worst mistake that can be made by a prospective claimant or plaintiff. This is, of course, true of all lawsuits, but is certainly no less true in the cargo claim context.

One challenge with respect to gathering and preserving evidence in the cargo context is that it causes delays – which, of course, are exactly what people in the transportation industry are trying to avoid! Gathering evidence can be a painstaking process, and it is something that nobody wants to spend time doing, particularly where the damage to the shipment may itself also cause other seemingly more pressing issues that need to be dealt with. It is certainly understandable that in the face of angry clients, tight deadlines and potential lost profits, one might decide to just put the matter out of one's mind and "get on with it". However, the reality is that if one is serious about recovering damages, the best way to maximize one's chance of recovery is by making sure that all of the relevant evidence is preserved. Remember, all of the parties who may be responsible for a loss will be keenly

FIRM AND INDUSTRY NEWS

- **Rui Fernandes** will be speaking at **The Chartered Institute of Logistics and Transport (North America)** Transport Outlook Conference in Mississauga on June 6th and 7th, 2017. He will be speaking on a panel on "Five Hot Topics in Transportation Law, Risk Management and Insurance" and on a panel on "Governance".

- The **Canadian Maritime Law Association** will be holding its annual meeting and seminar in Toronto on June 9th, 2017. **Rui Fernandes** is the seminar organizer. **James Manson** is one of the speakers on "Update on Maritime Law".

- **Canadian Defence Lawyers** will be hosting the Women's Caucus Luncheon on June 7, 2017 at the Austin Gallery in Toronto. **Kim Stoll** will be in attendance.

- **Toronto Transportation Club's Women in Transportation Luncheon** will be held on June 13th, 2017 at the Palais Royale in Toronto. **Kim Stoll**, **Carole McAfee Wallace** and **Jaclyne Reive** will be in attendance. Fernandes Hearn LLP is one of the sponsors of the event.

- **Gordon Hearn** will be speaking at the **Eye For Transport: 3PL & Supply Chain Summit** in Chicago, Illinois on June 16. He will be speaking on a panel addressing legal trends in the 3PL and supply chain marketplace, on "*Risk Management and Compliance in the Small and Medium Enterprise Market*".

INVITATION TO CILTNA CONFERENCE

Fernandes Hearn LLP is one of the sponsors for the **Chartered Institute of Logistics and Transport in North America ("CILTNA")** conference in Toronto.

CILTNA invites you to a special two-day event on how to profit from the rapid pace of change facing transportation and logistics professionals today.

Day One: come and discuss with experts the challenges and opportunities arising from disruptive change in the world economy:

• With big policy changes recommended by David Emerson, big infrastructure investments promised by government, and a new roadmap from the Minister of Transport - where do we go from here?

• Taking stock of a post-U.S. election world, what needs to be discussed and who needs to be involved to begin working toward an integrated, long term and modernized sector?

• Recognizing the realities of a trading nation, what needs to happen to position the sector for the next fifteen years' growth?

Day Two: the 2017 CILTNA Transport Outlook Conference will tackle "disruptive change: positioning the sector to grow and prosper"

Where?

The Mississauga Convention Centre
(North West corner of Huronontario Street (HWY 10) & Derry Road West in Mississauga, Ontario)

When?

Tuesday June 6th and Wednesday June 7th, 2017 from 8:00am to 4:30pm

Registration: http://www.ciltna.com/events-education#OUT2017

interested in the evidence and will certainly complain if they believe that some of that evidence has gone missing or is not available.

The evidence-gathering process will change depending on the facts of the case. Remember, boiled down to its most basic element, "evidence" is basically just information that helps answer the question, "what happened?" Obviously, such information can come from just about anywhere.

Here are some tips for gathering and preserving evidence:

First and foremost, keep the cargo! Do not sell or dispose of the damaged goods until both you and other interested parties have had a chance to inspect it, photograph it, test it, etc. If necessary, segregate the cargo and keep it in a warehouse, but it is important not to simply "dump" the cargo simply because it is damaged or spoiled. Without this critical evidence, it will be harder for you to prove the claim.

Keep the packaging! A carrier or other interested party may be able (and also has the right) to try and defend itself by saying that the cargo was defectively or insufficiently packaged. The packaging should be preserved so as to permit them to investigate.

Keep all shipping documents! This includes the Bill of Lading, any terms and conditions, tariff documents, commercial invoices and receipts, packing slips, carrier confirmations, customs documents and the like.

Keep other documents, such as e-mails and faxes to and from the other parties. This includes computer readouts from the truck and trailer (if any) – including the reefer temperature data, which is usually available.

Make inquiries immediately to find out if there is any video evidence available from security cameras or similar devices. Often these devices are overwritten every couple of days, so time is very much of the essence here.

Take a ton of photographs! Given that almost everyone with a mobile phone now has a mobile camera, there is simply no excuse anymore for failing to take extensive and detailed photographic evidence, especially if there is telling physical evidence that helps establish liability (for example, a hole in a shipping container or a broken security seal, etc.) Get the best camera you can; if none is available, use your phone. Take more photos, not fewer. Take hundreds! Try to take photos from all angles to capture all of the details you can. Zoom in and out; it's better to have shots close up and from far away, to help investigators (and, later, the court) get a good sense of the overall situation as well as the details. Remember as well that whoever takes the photos may become a witness if the matter ever goes to a trial. He or she will have to explain what the photos are, how and they were taken, etc.

Don't forget to interview everyone who may have been involved! This will be very helpful to the investigators and/or counsel who get involved later on in a file, so that they will know who the best witnesses will be, and also what their evidence will be. It is also good practice to take witness statements soon after a loss when everyone's memories are at their best.

Failure to Notify all Potentially Responsible Parties

It's equally important to notify all potential parties who might be responsible for the loss; failure to do so could cause trouble later on. It's always better to err on the side of caution: if you

think that a company or a person might be responsible for the loss, tell them, and do it as soon as possible. That way, no one can claim later on that they were prejudiced in a lawsuit because "no one notified them of the loss".

By way of example, imagine a lawsuit about a fire that burns down an office building. At issue is how the fire was caused. During the investigation of the fire, various experts ultimately conduct a joint inspection of the fire debris. These experts were retained by the building owner and other interested parties.

Now imagine that, during the initial stages of the investigation, a piece of evidence is discovered that points to faulty installation of the building wiring; however, no one expressly notifies the electrician who installed the wiring. As a result, the electrician or his insurer does not send its own investigator to the joint inspection, and they are not able to conduct a first-hand inspection. The fire scene is then cleared of debris. The electrician now claims that its interests have been seriously prejudiced by the oversight; obviously, this makes the lawsuit more complicated.

True, having more parties around might make an investigation more cumbersome and unwieldy; however, it is usually to a plaintiff's benefit to have as many parties "at the table" as possible. By doing so chances are maximized for two things: first, in the case of damage that occurred in the course of a multi-modal journey where it is unclear where or how the damage took place, that the "right" party (i.e. the responsible party) is present; and second, that there are enough "deep pockets" at the table to ensure that the plaintiff will recover from someone. Plus, as mentioned above, notifying all potentially liable parties as soon as possible both gives–those parties a chance to conduct their own investigation, and takes away any subsequent argument on their part that they have been prejudiced by not having been invited to participate in the initial investigation.

Failure to Mitigate

Failing to mitigate a loss is another common mistake made by a potential plaintiff in the cargo claim context.

The "duty to mitigate" is well-known in Canada. It means that a wronged plaintiff is entitled to recover damages from a defendant, but also that the plaintiff must act reasonably in minimizing those damages. As stated by Justice Nadon in *Alcan Aluminum Ltd. v. Unican International S.A.*: (*1)

> The ordinary rule of mitigation provides "*that the injured party act reasonably in all of the circumstances*". No loss is recoverable in damages if the party not in breach could have avoided the loss with reasonable diligence. This is a limitation on the innocent to the party in breach to act in any particular way. Chief Justice Laskin in *Michaels v. Red Deer College* (*2) explained the doctrine thus:
>
> > The primary rule in breach of contract cases, that a wronged plaintiff is entitled to be put in as good a position as he would have been if there had been proper performance by the defendant, is subject to the qualification that the defendant cannot be called upon to pay for avoidable losses which would result in an increase in the quantum of damages payable to the plaintiff. The reference in the case law to a "duty" to mitigate should be understood in this sense.
> >
> > In short, a wronged plaintiff is entitled to recover damages for the losses he has suffered but the extent of those losses may depend upon whether he has taken reasonable steps to avoid

> their unreasonable accumulation.
>
> The essential question to be answered in the context of mitigation of damages is what constitutes "reasonable" mitigation. First, the conduct of the plaintiff must be attributable to the breach. Fridman argues that "*the conduct that ought to be undertaken by the plaintiff must be foreseeable, and therefore reasonably to be expected from the plaintiff, if it is to constitute mitigation*."(*3) Nonetheless, the plaintiff's mitigation should be consistent with business realities. The onus is on the defendant to establish that the plaintiff has failed to mitigate its damages. While there are a number of cases dealing with the issue of mitigation, ultimately, the questions of proper mitigation is one of fact that will depend on the circumstances of the case.

Therefore, the obligation is on a plaintiff in a cargo claim situation to do what is reasonable in the circumstances to avoid further loss or damage. This will, of course, vary depending on the facts. In the cargo claim context, proper mitigation most often involves *salvaging* as much as one can from the damaged cargo. Perhaps some (or most) of the cargo was not affected and can be segregated from the damaged cargo and used or sold in the normal course. This might apply to packaged goods, or even to bulk goods. Or, perhaps the affected cargo can be sold at a lower price in a secondary market. Food product that is unfit for human consumption can often be sold as animal feed, for example.

On the other hand, it could be that sometimes (and particularly in the food industry) a claimant may well be justified in rejecting an entire load outright and insisting on its destruction rather than salvaging part of the load.

For example, imagine that you own a supermarket chain and that your business includes selling bulk food. Imagine that you buy a shipment of nuts, which is transported by ship from Malaysia to your stores in Canada. When the container full of nuts finally arrives at your loading dock, the entire shipment reeks of some sort of chemical. Ultimately it is determined that the nuts have been shipped in a container that somehow was contaminated with a petroleum product; the nuts are unfit for human consumption. Arguably, even though you may have located a buyer for the contaminated nuts who is willing to pay, say, 10% of the shipment's value to take the nuts and make animal feed with them, you could be justified in declining to sell and instead having the nuts destroyed, to protect your business reputation as a seller of "safe" bulk food.

That said, not all food loss cases are created equal. For example, take another hypothetical cargo claim where the consignee rejects an entire load of frozen vegetables that had been packed in boxes. The trailer full of frozen vegetables is parked overnight in an unsecure location; thieves break into the trailer and steal a few cases. Following discovery of the loss, the consignee becomes concerned that the entire shipment has become contaminated or otherwise compromised. It decides to destroy the entire shipment.

The company then files a claim against the carrier for the full value of the shipment. Counsel for the carrier, however, takes the position that there is no evidence that each and every case of frozen vegetables was compromised. The claimant, counsel alleges, has not pulped all of the cases; accordingly, there is no evidence supporting its claim that the entire load had to be rejected. Ultimately, the claimant never proceeds with an action against the carrier.

In most cases, there is likely a way to at least recover *some* of the value of the damaged goods. The bottom line is that when a cargo loss occurs, mitigation should be front and centre in

your mind. Speed will likely be the key in a successful mitigation effort, particularly when it comes to perishable goods. Hopefully the surveyor assigned will be able to assist; if not, your task will be to minimize the loss: you may have to find a buyer for the goods, on short notice, at a somewhat reasonable price. You may to get a replacement shipment of product arranged for delivery so that you won't incur production delays, etc.

And another thing: don't be too worried about the cost of mitigating. Insurance companies are familiar with the duty to mitigate and recognize that expenses incurred in the course of mitigating a loss are normal. Reasonable mitigation expenses are also allowed by the courts and should be ultimately recoverable from the responsible parties down the line.

Failure to Retain Counsel/Surveyor as Soon as Possible

Especially for large claims that will almost certainly proceed to litigation, it is critically important to retain at least a surveyor as soon as possible. A surveyor will be well-versed in the details of investigating the loss in the particular jurisdiction and will be able to assist with salvage operations, testing, taking photographs, and otherwise co-ordinating the investigation. Failure to do so could seriously hamper your chances of recovery.

If time, money and circumstances permit, engaging legal counsel is also highly recommended. This is particularly important when dealing with a cargo claim that has taken place in another jurisdiction where the legal system may be quite different than the one at home. This point sounds obvious; however, it's often the case that counsel are not retained until much later, after the cargo and evidence has been disposed of. Sometimes, this can pose significant challenges.

Take another case involving a fire. This time, imagine that the fire occurred in a motor vehicle that was parked overnight in a garage. At issue is how the fire was caused. Shortly after the fire took place, the owner of the vehicle and the owner of the garage notify other potentially interested parties, including the manufacturer of the trailer. Before counsel get involved, it is agreed that a joint destructive examination of the vehicle will take place.

Unfortunately, the vehicle manufacturer does not retain a fire investigator or legal counsel immediately to protect its interests; instead, it simply sends one of its sales managers to the investigation. Other investigators retained by other parties then proceed to inspect the vehicle, and prepare reports blaming the manufacturer for the cause of the fire. The manufacturer, meanwhile, has no way of conducting its own investigation or preparing a rebuttal report.

Imagine that the manufacturer only contacts its insurer several months later, after it has been served with the plaintiffs' lawsuit. The insurer then gets involved and appoints counsel. By then, of course, the vehicle has been disposed of and is no longer available for inspection. As you can imagine, this puts the manufacturer at a significant disadvantage. While it may be possible to belatedly take steps to engage a fire investigator who can review the photographs taken by the other experts and base his opinion on that evidence, it is of course far preferable to retain counsel at the outset, who would simply refuse to permit the joint examination of the vehicle to take place until an expert is retained on the manufacturer's behalf who could attend.

Finally, it goes without saying that, for cargo claims, it is critically important to engage surveyors and counsel who have *expertise* in transportation matters in general, and in the type of cargo claim at issue in particular. Cargo claims are usually quite technical and can be quite complicated, particularly in terms of navigating through the various parties, contractual documents, statutes and regulations, international law and conflicts of law aspects, limitations of liability, and many more. It is far preferable to deal with

knowledgeable counsel who have "been around the block" before.

Failure to Provide Timely Notice

Another mistake easily made that may well defeat a cargo claim in its entirety is the failure to notify the opponent(s) within the relevant time limit. In Canada, prospective plaintiffs who are contemplating commencing an action in connection with a trucking cargo claim must bear in mind a series of regulations, generally referred to as the "Uniform Conditions of Carriage", usually enacted through the highway traffic legislation governing in each province. (*4) One of the "uniform conditions" is "Condition 12", which sets up a statutory defence for a carrier that results in the outright dismissal of a plaintiff's action in circumstances where the plaintiff fails to first provide the carrier with notice of a claim by certain strict deadlines. First, written notice of the claim (setting out certain prescribed particulars) must be sent to the carrier with 60 days after delivery of the goods, or, in the case of non-delivery, within 9 months after the date of shipment.

Second, a final claim statement must be "filed" within nine months after the date of shipment, together with a copy of the paid freight bill. There is a two-year limitation period to commence a lawsuit in Ontario. The notice periods in Condition 12 are to be taken seriously. Claims are routinely dismissed by virtue of a plaintiff's complete failure to provide the carrier with proper notice. For example, in *Quality Circle Computers v. Royal Canadian Supply Chain Inc.*, (*5) a case where the plaintiffs claimed against a carrier in respect of certain equipment that had been damaged while in transit. The Court found that the plaintiff had not given notice to the carrier within 60 days after delivery of the damaged goods, as required. The claim was dismissed on that basis, among others.

Similarly, in *R & S Transportation Inc. v. 150726 Ontario Inc.*, (*6) in the context of an action by the carrier against its customer for unpaid invoices, the customer sought to establish a counterclaim against the carrier for losses suffered as a result of delayed deliveries by the carrier. The customer, however, admitted that it had not provided the carrier with notice of its claim against the carrier until two months after receiving the carrier's Statement of Claim, and at least eight months after the expiry of the initial 60-day period. The court dismissed the customer's counterclaim on that basis.

While courts in other cases have been more lenient and have permitted cases to proceed where a plaintiff has taken steps to provide notice, even where there was not perfect compliance, nonetheless the fact is that failure to observe a notice period is a serious matter that could stop a cargo claim dead in its tracks. Beware!

Conclusion

The above is certainly not an exhaustive list of all of the potential pitfalls and challenges that need to be dealt with in the context of a cargo claim, however, it's a good start. Avoiding the above mistakes should go a long way to ensuring a (relatively) quick and (relatively) pain-free recovery. And, should your cargo claim end up being more hard-fought that you had hoped, at least you will have gotten off on the right foot, which, in litigation matters, very often can be the difference between winning and losing.

James Manson

Endnotes

(*1) 64 ACWS (3d) 11, 113 FTR 81 at paragraphs 137-138 (FC)
(*2) (1975), 57 DLR (3d) 386 (SCC)
(*3) G. Fridman, *The Law of Contract*, 3rd ed. (Toronto: Carswell, 1994) at 600
(*4) In Ontario, the Uniform Conditions of Carriage are enacted in O. Reg. 643/05 "*Carriage of Goods*", pursuant to the *Highway Traffic Act*, RSO 1990, c. H.8.
(*5) 2011 CarswellOnt 16060 (Ont. Sm. Claims)
(*6) (2002), 118 ACWS (3d) 147, 30 BLR (3d) 94 (SCJ)

2. Floating Home is a Vessel

Courts have always struggled with the definition of what is a "vessel". The determination of whether an object is a ship or not is important in how it is dealt with. For example, if an object is a ship it will have insurance requirements that are different if it is not a ship, it may be required to comply with certain safety regulations under the *Canada Shipping Act 2001* and its regulations, it will have to file a preliminary act after a collision occurs, and it will be subject to the law of salvage.

Justice Atkinson in *Polpen Shipping Co. v. Commercial Union Assurance Company* [1943] K.B. 161, at 167. stated that a ship or a vessel is a "hollow structure intended to be used in navigation, that is, to do its real work on the seas or other waters, and capable of free ordered movement thereon from one place to another." Cases subsequently have considered other "objects" as ships. The starting point in Canada is the definition of vessel in section 2. Vessel is defined as: "a boat, ship or craft designed, used or capable of being used solely or partly for navigation in, on, through or immediately above water, without regard to method or lack of propulsion, and includes such a vessel that is under construction. It does not include a floating object of a prescribed class."

Recently the Federal Court of Canada had occasion to consider whether a floating home was a vessel and subject to Canadian maritime law. In *Moray Channel Enterprises v. Gordon,* 2017 FC 250, Justice Annis had to consider an application for a summary trial for moorage fees owed to a marina relating to a floating home. The float home was a registered as a vessel under the *Canada Shipping Act 2001.*

In the hearing, the vessel owner raised a constitutional issue that the Court lacked competence in the matter as the pith and substance of the action related to property rights, and in particular, landlord and tenant rights within the jurisdiction of the Province of British Columbia. The boat owner had previously unsuccessfully sought redress before the Residential Tenancy Board of British Columbia. The boat owner sought a stay of the Federal Court proceedings pending the determination of his judicial review application of the Board decision in the Courts of British Columbia.

The vessel had, prior to this summary hearing on the moorage fees, been arrested by the marina, and sold by the Marshall of the Federal Court after an injunction hearing before Justice Phelan. Justice Phelan had ordered the vessel to be removed from the marina, failing which the Marshall was permitted to sell the vessel in accordance with Court procedures. Justice Annis, in the summary proceedings, noted that at the vessel owner had not raised issues of the Court's jurisdiction in the injunction hearing. The Justice also noted that the boat owner had not raised the constitutional issue in the statement of defence. The Court rejected the vessel owner's arguments.

The Court awarded the marina $14,990.09 with interest and $3,000.00 in costs and disbursements. The vessel had been sold for $132,172.26. The marina had claimed $17,025.10 in moorage fees, enforcement expenses and expenses for removing the vessel pursuant to the Court order. The marina had also spent $18,142.10 in legal fees on the process.

Rui M. Fernandes

Follow *Rui M. Fernandes on Twitter @RuiMFernandes* and on Linkedin. See also his blog at http://transportlaw.blogspot.ca

3. Bill C-49 – Air Passenger Rights Bill and More

On May 16th, the Minister of Transport introduced Bill C-49, which includes a passenger bill of rights as part of a package of amendments to the *Canada Transportation Act.*

Consumer passenger rights advocate Gabor Lukas says "this bill is smoke, mirrors and [has] no teeth". (*1) The bill contains no provisions about the enforcement of the rights of travelers, nor any new sanctions against airlines that break the rules. The bill simply instructs the Canadian Transportation Agency to establish standards in the future. It is anticipated that the Agency will simply put into regulation what it has been deciding in the prior years when complaints have been made to it by the public. It is expected that the new legislation won't come into effect until 2018.

The legislation also increases the cap on foreign ownership of airlines to 49 per cent from 25 per cent, and introduces new allowances for airlines to enter into joint ventures with international carriers to do things such as share marketing and scheduling.

The passenger rights section of Bill C-49 provides:

> *Regulations — carrier's obligations towards passengers*
> *Règlements — obligations des transporteurs aériens envers les passagers*
> 86.11 (1) The Agency shall, after consulting with the Minister, make regulations in relation to flights to, from and within Canada, including connecting flights,
> (a) respecting the carrier's obligation to make terms and conditions of carriage and information regarding any recourse available against the carrier, as specified in the regulations, readily available to passengers in language that is simple, clear and concise;
> (b) respecting the carrier's obligations in the case of flight delay, flight cancellation of denial of boarding, including
> (i) the minimum standards of treatment of passengers that the carrier is required to meet and the minimum compensation the carrier is required to pay for inconvenience when the delay, cancellation or denial of boarding is within the carrier's control,
> (ii) the minimum standards of treatment of passengers that the carrier is required to meet when the delay, cancellation or denial of boarding is within the carrier's control, but is required for safety purposes, including in situations of mechanical malfunctions
> (iii) the carrier's obligation to ensure that passengers complete their itinerary when the delay, cancellation or denial of boarding is due to situations outside the carrier's control, such as natural phenomena and security events, and
> (iv) the carrier's obligation to provide timely information and assistance to passengers;
> (c) prescribing the minimum compensation for lost or damaged baggage that the carrier is required to pay;
> (d) respecting the carrier's obligation to facilitate the assignment of seats to children under the age of 14 years in close proximity to a parent, guardian or tutor at no additional cost and to make the carrier's terms and conditions and practices in this respect readily available to passengers;
> (e) requiring the carrier to establish terms and conditions of carriage with regard to the transportation of musical instruments;
> (f) respecting the carrier's obligations in the case of tarmac delays over three

hours, including the obligation to provide timely information and assistance to passengers, as well as the minimum standards of treatment of passengers that the carrier is required to meet; and

(g) respecting any of the carrier's other obligations that the Minister may issue directions on under subsection

Gabor Lukas, says the Agency is too cozy with the airlines that it is supposed to be policing and does not think this bill will assist passengers.

"I am profoundly concerned that the same biased body which in the past three, four years completely failed to enforce our rights is going to be in charge of developing regulations and then enforcing them," Lukas said in an interview. "This makes absolutely no sense and this is nothing short of entrusting the fox with guarding the hen house." (*2)

Rui M. Fernandes

Follow *Rui M. Fernandes on Twitter @RuiMFernandes* and on Linkedin. See also his blog at http://transportlaw.blogspot.ca

Endnotes

(*1) CTV news May 18, 2017.

(*2) http://www.cbc.ca/news/politics/passenger-bill-of-rights-transportation-act-1.4118452

4. Court Permits Retention of Confidential Information Post-Employment in Absence of Specific Contractual Prohibition

Many employers assume that departing employees or officers are not entitled to take confidential information with them. A recent decision of the Honourable Mr. Justice MacLeod of the Ontario Superior Court of Justice appears to turn that assumption on its head.

In *ORBCOMM Inc. v. Randy Taylor PC*, His Honour declined to make an interim injunction order for the return or destruction of such data. (*1)

The *ORBCOMM* case concerned the former CEO and the former CFO of a Skywave, a company which was acquired by ORBCOMM. On their departure, the two unabashedly made electronic copies of e-mails and other documents. The CEO had been an officer of Skywave, but not an employee. The CFO was both an officer and an employee of Skywave.

The data was presumably inclusive of very sensitive information. In the case of the CEO, for instance, it included the entire electronic data room of documents disclosed by the parties in connection with the purchase-and-sale negotiations amongst ORBCOMM and Skywave.

In the circumstances, both agreed to disclose what they had taken, but they refused to destroy their original copies. (The CFO also agreed to destroy documents that she had created with the information after leaving.)

The company made an application pursuant to section 104 of the Ontario *Courts of Justice Act*, which permits a court to make an interim order for the recovery of personal property.(*2)

His Honour side-stepped the question whether pure data can be considered "property", saying only that he "would be reluctant" to rule it out. In the circumstances, though, the data at issue was contained in physical – albeit electronic - documents, which are clearly "property" according to the common law.

The company's written agreement with the CEO had prohibited the misuse of confidential information, but it did not explicitly prohibit the copying of such information for personal use. No evidence was led as to any written terms of the CFO's agreement.

In the result, the materials were left in the hands of the respondents. The company was only entitled to copies of its documents.

Clearly, this can be seen as a warning for employers. In appropriate circumstances, employment agreements ought to explicitly address the use and retention of confidential information. Those agreements should specifically require the return of data and the destruction of copies. They may also prohibit the copying of materials during the course of employment, so that such unfortunate situations can be headed off at the pass.

Alan S. Cofman

Endnotes

(*1) 201 ONSC 2308.
(*2) R.S.O. 190, c. C.43.

5. The Competing Goals of Certainty and Fairness in Contracts: A Recent Case Law Study

The parties to a written contract may want to ensure that the contract – and it alone – frames their rights and obligations. Often times this calls for the inclusion of an "Entire Agreement" clause in a contract. An example is as follows:

> This Agreement constitutes the entire agreement between the parties and supersedes all prior communications, representations, understandings and agreements whether verbal or written between the parties with respect to the subject-matter hereof. No amendment, variation, representations or communications shall affect this Agreement unless it is agreed by the parties in writing.

Over the course of the term of a contract a dispute may arise. One party may try to suggest that the written document did not in fact specifically capture an aspect of the relationship. That party may cite unfairness in the strict application of the "written word". They might cite certain promises or assurances as untrue, or breached, and that led them to signing the contract that were not incorporated into the written contract. They might cite the fact that the other party has acted inconsistently with the contract terms and thus should not be able to rely on same. Meanwhile, the other party to the contract may well assert that the parties had painstakingly reduced things to writing and that (whether there be an "Entire Agreement" clause or not) each party should accordingly be bound to the terms of the written document.

Will such an "Entire Agreement" clause govern according to its terms? Will a written contract - with or without such a clause - govern to the exclusion of "extrinsic" evidence of pre-contractual dealings or discussions not reflected in the document? On the one hand, there is a premium placed with contracting certainty. Parties to a contract are of course generally expected to abide by their obligations and to not try to change their bargain "midstream". On the other hand, there may be situations where fairness calls for a court not to mechanically and strictly apply the written contract – even when it contains an "Entire Agreement" clause. Recent case law provides some examples of how the courts try to reconcile the competing interests of contract certainty and fairness.

1. Was there a "Negligent Misstatement" Inducing a Party into the Contract? *Cary Feldstein and 364 Northern Development Corporation* (*1)

364 Northern Development Corporation ("364") extended an offer of employment to Cary Feldstein for a position as a software engineer. Prior to accepting the offer, Mr. Feldstein, who suffered from cystic fibrosis, inquired about the eligibility requirements for long-term disability ("LTD") coverage under 364's benefits plan. He was advised by 364's Chief Information Officer that the "proof of good health" clause in 364's LTD benefits summary related to the three-month continuous employment waiting period before benefits coverage came into effect. Mr. Feldstein understood this to mean that working at 364 for three months, without illness, would constitute "proof of good health" for the purposes of obtaining LTD benefits under 364's group plan notwithstanding his pre-existing condition and the absence of a completed medical questionnaire or examination. This information was very important to Mr. Feldstein, who knew that he would require substantial LTD benefits at some point in the future and would be unlikely to qualify for LTD coverage if a medical examination was required. The evidence indicated that Mr. Feldstein would not have accepted employment with 364 if its group benefits plan did not provide him with what he viewed as adequate LTD benefits with acceptable eligibility requirements.

Mr. Feldstein accepted 364's employment offer in April 2012. His health declined dramatically in May 2013. When he applied for LTD benefits, he discovered that he was not eligible for the full benefits he had anticipated receiving — 66.67% of his monthly earnings up to a maximum of $5,000, or approximately $4,667 per month. In

fact, Mr. Feldstein was advised that he was only eligible for the "Non-Evidence Maximum" of $1,000 per month because he failed to fill out a medical questionnaire upon being enrolled in a group benefits program. As Mr. Feldstein received $963.44 per month in Canada Pension Plan ("CPP") benefits, which were deducted from his LTD coverage entitlement, his LTD payments from the group insurer amounted to a little less than $36.56 per month.

Mr. Feldstein commenced an action against 364 in tort for negligent misrepresentation alleging that he was induced into the employment contract on the basis of misinformation. At trial the judge found 364 liable for negligent misrepresentation and awarded Mr. Feldstein $83,336.80 for lost LTD benefits in addition to other relief. 364 appealed this result, arguing that the employment contract precluded a claim in tort and that the judge erred in concluding that Mr. Feldstein's claim met the test for negligent misrepresentation.

The employment contract included the following terms:

> 4.02 Benefits. The Employee shall be entitled to participate in all rights and benefits under any life insurance, disability, medical, dental, health and accident plans maintained by the company for its employees generally. In addition, the Employee shall be entitled to participate in all rights and benefits under other employee plan or plans as may be implemented by the Company during the term of this Agreement.
>
> . . .
>
> 7.03 Entire Agreement. This Agreement constitutes the entire agreement between the parties and supersedes all prior communications, representations, understandings and agreements whether verbal or written between the parties with respect to the subject-matter hereof. No amendment, variation, representations or communications shall affect this Agreement or the Employee's employment with the Company unless it is made in writing,

The Trial Judge's Analysis on the Law of the Tort of Negligent Misrepresentation

The trial judge relied on *Queen v. Cognos Inc*. (*2) as the guiding authority for her negligent misrepresentation analysis. She described the legal test as follows:

1) Was there a duty of care based on a "special relationship" between the representor and representee?
2) Was the representation in question inaccurate, untrue, or misleading?
3) Did the representor act negligently in making that representation?
4) Did the representee rely, in a reasonable manner, on that representation?
5) Did the representee incur damages as a result of that reliance?

After reviewing all of the evidence, the judge concluded that all of the above components had been established on the evidence and that the plaintiff had suffered damages in relying on the misrepresentation.

The Entire Agreement Clause

The trial judge found that the Entire Agreement clause did not preclude Mr. Feldstein from suing 364 in tort for negligent misrepresentation, noting that a plaintiff's ability to sue in tort for negligent misrepresentation was not necessarily extinguished by entering into a subsequent contract with the “representor”. The question to consider was whether an express term of a contract creates a contractual duty that is co-extensive with the tort duty of care such that the plaintiff could then be said to be confined to remedies available in the contract only. The judge found that no such term existed in Mr. Feldstein's employment contract with 364. She noted that the only contractual term relevant to benefits was the above cited “Benefits” clause which merely confirmed Mr. Feldstein's entitlement to participate in 364's benefits plan. Further, the

judge found that there was no contractual term which expressly excluded 364's liability for negligence.

At the Court of Appeal

The Court of Appeal considered whether the "Entire Agreement" clause excluded the plaintiff's claim for negligent misrepresentation. The defendant employer argued that negligence need not be expressly referred to in a contractual exclusion clause in order to exclude an action in negligence: *Intrawest Corp. v. No. 2002 Taurus Ventures Ltd*. ("Taurus") (*3) and that the parties had intended that the express contract would govern the whole of their relationship. It accordingly argued that the Entire Agreement clause should be given effect so as to exclude tort liability.

The *Taurus* decision reviewed the Supreme Court of Canada's jurisprudence on the issue of "concurrent liability" in contract and tort:

> The Supreme Court of Canada made it clear in *Central Trust v. Rafuse*, 1986 CanLII 29 (SCC), and, continuing the analysis, in *BG Checo International Ltd. v. British Columbia Hydro and Power Authority,* 1993 CanLII 145 (SCC) and *Cognos*, that a breach of pre-contractual representations may be actionable as both a breach of contract and negligent misrepresentation, with clear exceptions arising from the express terms of the contract.
>
> In *BG Checo*, La Forest and McLachlin, JJ., writing for the majority, said (at 26-27):
>
> In our view, the general rule emerging from this Court's decision in *Central Trust Co. v. Rafuse* (1986), 1986 CanLII 29 (SCC) is that where at first blush a given wrong supports an action in contract and in tort, the party may sue in either or both, except where the contract indicates that the parties intended to limit or negative the right to sue in tort. This limitation on the general rule of concurrency arises because it is always open to parties to limit or waive the duties that the common law would impose on them for negligence. This principle is of great importance in preserving a sphere of individual liberty and commercial flexibility . . . .
>
> Viewed thus, the only limit on the right to choose one's action is the principle of primacy of private ordering — the right of individuals to arrange their affairs and assume risks in a different way than would be done by the law of tort. It is only to the extent that this private ordering contradicts the tort duty that the tort duty is diminished . . . In so far as the tort duty is not contradicted by the contract, it remains intact and may be sued upon.
>
> We conclude that actions in contract and tort may be concurrently pursued unless the parties by a valid contractual provision indicate that they intended otherwise. This excludes, of course, cases where the contractual limitation is invalid, as by fraud, mistake, or unconscionability. Similarly, a contractual limitation may not apply where the tort is independent of the contract in the sense of falling outside the scope of the contract . . .
>
> …
>
> The majority in *BG Checo* disagreed with Iacobucci J.'s analysis of the concurrency of claims in tort and contract. He took the position, repeated in Cognos (at 113) that the parties to a contract may preclude an action in tort where there is an express term in the contract dealing with the matter (see BG Checo, at 26, 67-8). The majority in BG Checo held (at 27): The mere fact that the parties have dealt with a matter expressly in their contract does not mean that they intended to exclude the right to sue in tort. It all depends on how they have dealt with it.

The Court of Appeal found that the trial judge, who was clearly "alive" to the governing

principles, properly found that the entire agreement clause did not exclude tort liability for 364's misrepresentation because there was no express term in the contract which created a specific duty that was co-extensive with the duty of care created by the misrepresentation. In other words, the subject matter of the impugned statement — how "proof of good health" was related to the eligibility requirements for full LTD coverage — did not become an express term of the contract. Section 4.02 of the contract merely confirmed that Mr. Feldstein would be entitled to participate in any benefits plan that was available to 364's employees.

In the result, the Court of Appeal upheld the award of damages for the plaintiff notwithstanding that the employment contract was in writing and it contained an "Entire Agreement Clause".

2. Can the Court Consider Evidence of an Oral Contract That Was Made Before the Written Contract was Made? *Michta v. Stewart* (*4)

The plaintiff Michta and his wife advanced money to the defendant Stewart for investment in an Internet start-up company. The written agreement between the parties provided that the plaintiff would be repaid only if certain events occurred. The plaintiff however claimed that the defendant gave him an oral undertaking that his money would be returned at any time on demand. The plaintiff made the demand, and sued the defendant when payment was not made.

In the legal proceedings the Court accepted the plaintiff's evidence concerning the oral undertaking. The defendant did not deny that the oral undertaking had in fact been given as alleged, but argued that the parol evidence rule (explained below) precluded the introduction of the oral agreement into evidence, the written agreement being otherwise clear and unambiguous as to the events that would have to come to pass for the plaintiff to be repaid his money. The defendant argued that such a "repayment" event had not occurred.

The nature of the parol evidence rule, and of one of its exceptions, were described by the Court of Appeal in *Gutierrez v. Tropic International Ltd.* (*5) In that case, the Court held that under the parol evidence rule, when the language of a written contract is clear and unambiguous, extrinsic evidence is not admissible to vary, qualify, add to, or subtract from, the words of the written contract. However, the Court went on to say that the rule is not absolute, being subject to numerous exceptions: one of those exceptions being cases where there is evidence of a distinct collateral agreement, which does not contradict, and is not inconsistent with, the written contract. In an important statement of law the Court ruled that:

> "… the parol evidence rule is not a rule of evidence. It is a rule of contractual interpretation. The purpose of contractual interpretation is to determine what the parties agreed to".

In ruling for the plaintiff, the Court noted that the legal basis for the claim as pleaded was not a breach of the *written* agreement, but rather a breach of the *oral* agreement to return the plaintiff's money on demand. Evidence as to why the parties signed the written agreement was thereby relevant and admissible. The oral agreement did not expressly contradict, and was not inconsistent with, the written agreement. The Court simply found that in the circumstances that it would be unjust not to enforce the oral bargain.

No doubt the Court was influenced in weighing the "fairness" consideration in finding that the parties were not equally knowledgeable and that the defendant "held all the cards" in the negotiation.

3. Have the Parties Acted Inconsistently with their Written Contract so as to provide the Court a basis to consider the existence of a Broader Arrangement? *XPG, C & M Seeds Manufacturing Inc. v. Royal Bank of Canada* (*6)

This recent decision of the Ontario Superior Court of Justice held that, although that the parties had reduced their rights and obligations to a written contract, they had in effect altered certain provisions by their conduct during the term of the contract. The Court cited the Ontario Court of Appeal decision in *Shelanu Inc. v. Print Three Franchising Corp*. (*7). In that case the parties to a franchise agreement entered into an oral agreement that was at odds with the terms of the earlier written document. The written agreement contained an "Entire Agreement" clause along the lines of the foregoing sample wording. In the course of litigation on the written agreement, one party sought to rely upon the Entire Agreement clause to the exclusion of a subsequent oral agreement between the parties. The Court of Appeal held that:

> . . . Where the parties have, by their subsequent course of conduct, amended the written agreement so that it no longer represents the intention of the parties, the court will refuse to enforce the written agreement. This is so even in the face of a clause requiring changes to the agreement to be in writing.

The Take Away

The foregoing scenarios attest to the goal of the courts to determine the mutual intention of parties to a contract. Parties to contracts need to be “live” to the fact that there is not only the obvious premium of adopting clear language in a written agreement, but that the same can in effect be altered by a court in the interest of fairness. Parties need to be aware that pre-contractual discussions and, for that matter, post-contractual conduct may be taken into consideration by a court in its interpretation of and enforcement of a contract and that they need to govern themselves – and to negotiate their contracts – accordingly.

Gordon Hearn

Endnotes

(*1) 2017 Carswell BC 1137 (BCCA)
(*2) [1993] 1 S.C.R. 87
(*3) 2007 BCCA 228
(*4) 2016 ONSC 5898
(*5) (2002), 63 O.R. (3d) 63 (Ont. C.A.)
(*6) 2017 CarswellOnt 6232 (ONSJ)
(*7) 2003 CarswellOnt 2038 (Ont. C.A.)

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