Suit No. AI 97-30-03104 Appeal from 112 Man.R. (2d) 216

IN THE COURT OF APPEAL OF MANITOBA

Coram: Huband, Helper and Kroft JJ.A.

B E T W E E N:

D. J. PROVENCHER LIMITED	)	**W. S. Gange** and
	)	**J. G. Collins**
(Plaintiff) Respondent	)	for the Appellants
	)	
- and -	)	**M. G. Finlayson** and
	)	**G. A. Stefanson**
TYCO INTERNATIONAL OF CANADA LIMITED, operating as GRINNELL FIRE PROTECTION and as GRINNELL FIRE PROTECTION SYSTEMS COMPANY and TOM GLENEWINKEL	)	for the Respondent
	)	
	)	Appeal heard and
	)	Decision pronounced:
	)	**September 16, 1997**
	)	
(Defendants) Appellants	)	Written reasons:
	)	**October 6, 1997**

HELPER J.A.

These are the reasons for the dismissal of the appellants' appeal from a judgment in favour of D. J. Provencher Limited (Provencher).

The dismissal of this appeal does not result in any new pronouncements on "limitation of liability" clauses in the law of contract. The trial judge concluded that the clause in question in Grinnell Fire

Protection Systems Company's (Grinnell) contractual document did not form part of the agreement for the work Grinnell did and the materials it supplied to Provencher on January 4, 1993. The appeal was dismissed on the basis of the trial judge's findings of fact.

Provencher was the franchisee of a Canadian Tire store which it operated on Isabel Street in Winnipeg. It leased and occupied a warehouse on Roseberry Street for storage purposes in connection with its franchise business. Grinnell carried on a fire protection business, which included the supply, installation and repair of sprinkler systems. Tom Glenewinkel (Glenewinkel) was an employee of Grinnell.

On January 4, 1993, Michael Provencher (Michael), an employee of Provencher, attended to the Roseberry Street warehouse and discovered that the building was cold, that some of the overhead sprinkler pipes had frozen and were broken, that water was dripping from the sprinkler piping, and that ice was visible on the concrete floor of the warehouse. Michael immediately phoned Provencher's store manager for directions and assistance. The manager was unable to obtain the services of Vipond, the company that had installed the sprinkler system, but managed to have Grinnell dispatch Glenewinkel to the warehouse almost immediately to analyze the problem and effect the necessary repairs.

The water supply to the sprinkler system could be shut off by two different valves - an interior valve that Michael had turned to the

closed position on the direction or under the supervision of Glenewinkel, and an exterior valve that was controlled by the City of Winnipeg water department.

The trial judge concluded that it should have been clear to all those present at the warehouse on January 4, 1993 that it was necessary for the water supply to the overhead sprinkler system to be shut off and the heating problem in the building rectified so the system could thaw out and then be repaired. As previously stated, Michael turned the crank on the interior control valve and observed the indicator move to the closed position. No one thought to question or check the working condition of that valve despite the frozen pipes. Glenewinkel omitted to call the City of Winnipeg water department to have the exterior curb valve shut off, and it did not occur to Michael to take that step.

Glenewinkel was able to effect some minor repairs on the system, but advised Michael that he would have to return and complete the repairs once the furnaces in the warehouse had been put into working condition and the heat restored. Before leaving the warehouse on January 4, 1993, Glenewinkel had Michael sign a document acknowledging the repairs to date and indicated on the document that the system had been temporarily shut off "until bldg. gets heated." He advised Michael to call the company which monitored the alarm system in the warehouse, and to inform Provencher's store manager to contact both the insurance company and the fire department and inform them that there was no fire protection.

The invoice which Michael signed stated on its face, in red letters, "SEE REVERSE SIDE FOR SPECIFIC TERMS." On the reverse side was a limitation of liability clause which read:

> In no event shall Seller be liable for special or consequential damages. Seller's liability on any claim for loss or liability arising out of or connected with this contract, or any obligation resulting therefrom, or from the manufacture, fabrication, sale, delivery, installation, or use of any materials covered by this contract, shall be limited to that set forth in the paragraph entitled "Warranty."

Under its warranty provision, Grinnell does not guarantee the operation of the system and it excludes all other express or implied warranties of merchantability or fitness, except defective materials or workmanship supplied or performed by it.

The heating system was repaired that same afternoon. Unfortunately, the interior valve that both Michael and Glenewinkel had thought shut off the water supply to the sprinkler system had broken upon the freeze-up of the water within the system. When the building was heated, water flooded the warehouse, causing extensive damage. It was on January 6, 1993, when Glenewinkel returned to complete the repairs, that he discovered the interior shut-off valve was broken.

It is common ground that Michael did not examine the reverse side of the original copy of the document he signed on Glenewinkel's

direction and that neither he nor the store manager was aware of the limitation of liability clause. It is also common ground that Glenewinkel retained the "Customer's Order Copy," which contained the limitation clause, and left with Michael the "Salesman's Copy," which was blank on the reverse side.

None of the cases Grinnell's counsel provided to the Court are based on facts similar to the case at bar. However, they do have a common element. In each case, the contract or release signed or taken by the plaintiff was signed or received by him or her prior to the action taken pursuant to the contract, which action led to the injurious result.

In this case, Grinnell was aware it was retained on an urgent basis. Grinnell did not inform Provencher of the terms of the contract prior to dispatching Glenewinkel to effect repairs. It was only after he advised Michael or provided his supervision to him on the closure of the interior valve to the water supply, and after he had completed his initial repair work, that Glenewinkel submitted Grinnell's form of contract to Michael for signing. Glenewinkel did not make any reference to the terms and conditions on the reverse side of the signed copy of the agreement (he was unaware of the existence of those terms), and he erroneously left with Michael the wrong copy of that document.

It was for these reasons that the trial judge found the limitation clause was not effectively incorporated into the contract between

Provencher and Grinnell on January 4, 1993. He concluded that, in the urgency of the situation in which Provencher found itself, Grinnell was under an obligation to take reasonable steps to draw the limitation of liability clause to Provencher's attention before it entered into a contractual relationship with it, or at least before a breach of contract or negligent act or omission occurred.

This Court concurred with the trial judge's reasons and dismissed the appeal, with costs.

_____ J.A.

I agree: _____ J.A.

I agree: _____ J.A.