

2009 ABCA 390
Alberta Court of Appeal

Galichowski v. Shaw GMC Pontiac Buick Hummer Ltd.

2009 CarswellAlta 2019, 2009 ABCA 390, [2010] 3 W.W.R. 609, [2010] A.W.L.D. 257, [2010] A.W.L.D. 258, [2010] A.W.L.D. 297, 17 Alta. L.R. (5th) 215, 183 A.C.W.S. (3d) 977, 469 A.R. 156, 470 W.A.C. 156, 65 B.L.R. (4th) 100, 90 M.V.R. (5th) 60

Shannon Galichowski and the same Shannon Galichowski in her capacity as Administrator of the Estate of Russell Galichowski and in her capacity as Next Friend of Megan Rose Galichowski, an infant and Joseph Galichowski and Sonja Galichowski (Not Parties to the Appeal / Plaintiffs) Shaw GMC Pontiac Buick Hummer Ltd. (Appellant / Defendant) and Polaris Explorer Ltd. (Respondent / Defendant) and The Public Trustee as nominal Administrator Ad Litem of the Estate of John Scott MacDonald (Not a Party to the Appeal / Defendant)

Elizabeth McFadyen, Peter Martin, J.D. Bruce McDonald JJ.A.

Heard: November 6, 2009
Judgment: December 14, 2009
Docket: Calgary Appeal 0901-0056-AC

Proceedings: reversing *Galichowski v. Shaw GMC Pontiac Buick Hummer Ltd.* (2008), 2008 ABQB 673, 2008 CarswellAlta 1698, 52 B.L.R. (4th) 137, 1 Alta. L.R. (5th) 314, 459 A.R. 221, [2009] 6 W.W.R. 181, 75 M.V.R. (5th) 214 (Alta. Q.B.)

Counsel: D.K. Yasui, Q.C. for Appellant
A.G.P. Shewchuk, Q.C. for Respondent

Subject: Corporate and Commercial; Contracts; Insurance

Related Abridgment Classifications

Contracts

VII Construction and interpretation

VII.4 Resolving ambiguities

VII.4.b Contra proferentem

Contracts

VII Construction and interpretation

VII.5 Words and phrases

VII.5.e Miscellaneous

Guarantee and indemnity

III Indemnity

III.4 Extent of liability

III.4.a General principles

Headnote**Guarantee and indemnity --- Indemnity — Extent of liability — General principles**

Employee was involved in motor vehicle accident while driving car that was leased by employer — Driver in other vehicle was killed — Master rental agreement between employer and lessor contained indemnity clause obliging employer to indemnify lessor for any loss, damage, cost or expense incurred as result of use or operation of vehicle — Deceased's estate and others sued employee, employer and lessor — Summary trial judge found that employer was not obligated to indemnify lessor pursuant to indemnity provision of rental agreement for any liability attributable to employee in main action — Summary trial judge held that it was possible that third party claims arising from personal injury or death fell within scope of indemnity for "any loss, damage, cost or expense" — After considering contract as whole, requirement under rental agreement for third party liability insurance, and case authority for narrow reading of indemnity provision, summary trial judge concluded that "any loss, damage, cost or expense" did not include indemnity for third party claims — Alternatively, summary trial judge held that indemnity provision was ambiguous and rule of contra proferentem required very plain words to establish unusual liability or onerous indemnity obligation — Lessor appealed — Appeal allowed — Employer was obliged to indemnify lessor pursuant to indemnity provision for any liability attributable to employee or employer in main action — Indemnity clause was neither unreasonable nor unconscionable and therefore should have been interpreted according to its terms untrammelled by any special rule — There was no ambiguity in indemnity clause and it therefore had to be given its plain and ordinary meaning in favour of lessor — There was no need to consider doctrine of contra proferentem.

Contracts --- Construction and interpretation — Resolving ambiguities — Contra proferentem

Employee was involved in motor vehicle accident while driving car that was leased by employer — Driver in other vehicle was killed — Master rental agreement between employer and lessor contained indemnity clause obliging employer to indemnify lessor for any loss, damage, cost or expense incurred as result of use or operation of vehicle — Deceased's estate and others sued employee, employer and lessor — Summary trial judge found that employer was not obligated to indemnify lessor pursuant to indemnity provision of rental agreement for any liability attributable to employee in main action — Summary trial judge held that it was possible that third party claims arising from personal injury or death fell within scope of indemnity for "any loss, damage, cost or expense" — After considering contract as whole, requirement under rental agreement for third party liability insurance, and case authority for narrow reading of indemnity provision, summary trial judge concluded that "any loss, damage, cost or expense" did not include indemnity for third party claims — Alternatively, summary trial judge held that indemnity provision was ambiguous and rule of contra proferentem required very plain words to establish unusual liability or onerous indemnity obligation — Lessor appealed — Appeal allowed — Employer was obliged to indemnify lessor pursuant to indemnity provision for any liability attributable to employee or employer in main action — Indemnity clause was neither unreasonable nor unconscionable and therefore should have been interpreted according to its terms untrammelled by any special rule — There was no ambiguity in indemnity clause and it therefore had to be given its plain and ordinary meaning in favour of lessor — There was no need to consider doctrine of contra proferentem.

Contracts --- Construction and interpretation — Words and phrases — Miscellaneous

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was ambiguous and rule of contra proferentem required very plain words to establish unusual liability or onerous indemnity obligation — Lessor appealed — Appeal allowed — Employer was obliged to indemnify lessor pursuant to indemnity provision for any liability attributable to employee or employer in main action — Indemnity clause was neither unreasonable nor unconscionable and therefore should have been interpreted according to its terms untrammelled by any special rule — There was no ambiguity in indemnity clause and it therefore had to be given its plain and ordinary meaning in favour of lessor — There was no need to consider doctrine of contra proferentem.

Table of Authorities

Cases considered:

Canada Steamship Lines Ltd. v. R. (1952), 5 W.W.R. (N.S.) 609, [1952] 1 All E.R. 305, [1952] 2 D.L.R. 786, [1952] 1 T.L.R. 261, 96 S.J. 72, [1952] 1 Lloyd's Rep. 1, [1952] A.C. 192, 1952 CarswellNat 192 (Canada P.C.) — distinguished

Double N Earthmovers Ltd. v. Edmonton (City) (2005), 6 M.P.L.R. (4th) 25, 41 Alta. L.R. (4th) 205, 2005 ABCA 104, 2005 CarswellAlta 276, 363 A.R. 201, 343 W.A.C. 201, [2005] 10 W.W.R. 1 (Alta. C.A.) — referred to

Double N Earthmovers Ltd. v. Edmonton (City) (2007), 2007 CarswellAlta 36, 2007 CarswellAlta 37, 2007 SCC 3, 391 W.A.C. 329, 401 A.R. 329, 275 D.L.R. (4th) 577, 28 B.L.R. (4th) 169, [2007] 1 S.C.R. 116, 29 M.P.L.R. (4th) 1, 68 Alta. L.R. (4th) 1, 58 C.L.R. (3d) 4, [2007] 3 W.W.R. 1, 356 N.R. 211 (S.C.C.) — referred to

Gillespie Brothers & Co. v. Roy Bowles Transport Ltd. (1972), [1973] 1 All E.R. 193, [1973] 1 Lloyd's Rep. 10, [1973] 1 Q.B. 400 (Eng. C.A.) — considered

Prudential Assurance Co. v. Walwyn, Stodgell, Cochran, Murray Ltd. (1985), 50 O.R. (2d) 609, 9 O.A.C. 304, 17 D.L.R. (4th) 763, 1985 CarswellOnt 1596 (Ont. C.A.) — considered

Statutes considered:

Traffic Safety Act, R.S.A. 2000, c. T-6
s. 187(1) — referred to

s. 187(2) — referred to

APPEAL from judgment reported at *Galichowski v. Shaw GMC Pontiac Buick Hummer Ltd.* (2008), 2008 ABQB 673, 2008 CarswellAlta 1698, 52 B.L.R. (4th) 137, 1 Alta. L.R. (5th) 314, 459 A.R. 221, [2009] 6 W.W.R. 181, 75 M.V.R. (5th) 214 (Alta. Q.B.).

Per curiam:

I. Introduction

1 This appeal is about whether the indemnity provision in a standard form leasing agreement indemnified the owner of the commercial vehicle from liability for third party claims arising from the negligent operation of the leased vehicle by the lessee's employee.

II. Facts

2 Russell Galichowski was killed in a motor vehicle accident. His estate and others sued the driver of the other vehicle involved in the accident, John Scott MacDonald (MacDonald). At the time of the accident, MacDonald was acting within the scope and course of his employment with his employer, Polaris Explorer Ltd. (Polaris) and was driving the motor vehicle with Polaris' express or implied consent.

3 MacDonald subsequently died, unrelated to the accident, and therefore the Public Trustee was named as nominal Administrator *ad litem* in the action. As well, the plaintiffs sued Polaris and Shaw GMC Pontiac Buick Hummer Ltd. (Shaw GMC), the owner of the vehicle driven by MacDonald and leased by Polaris.

4 The appellant Shaw GMC admits that as owner of the vehicle it is vicariously liable for MacDonald's negligence. At issue is whether the indemnity clause in the Master Rental Agreement between the respondent Polaris and Shaw GMC obliges Polaris to indemnify Shaw GMC for the third party claims for personal injury and death arising out of this particular accident. Polaris had initially rented the vehicle driven by MacDonald on a daily basis but was being invoiced monthly by Shaw GMC as a Short Term Lease under the Master Rental Agreement.

5 The indemnity provision in the Master Rental Agreement (Indemnity Provision) provided as follows:

14. Indemnity

The Customer [Polaris] shall indemnify and save harmless [Shaw GMC] from any loss, damage, cost or expense which may be incurred as a result of this Agreement or the use or operation of any Vehicle(s) including legal costs on a solicitor and his own client basis (full indemnity) plus disbursements.

6 Other provisions of the Master Rental Agreement referred to in the decision of the court below are:

2. Term

.....

b. In the event the Customer has specified Daily Rental in any Schedule(s) as the nature of the vehicle usage and the Vehicle(s) are not returned to the Lot within 85 days of the Time Out, then the nature of the vehicle usage shall automatically be deemed to be a Short Term Lease and paragraph 4(b) shall be applicable.

4. Insurance

a. In the event the Customer has specified Short Term Lease ... the Customer shall ... provide evidence satisfactory to [Shaw GMC] of the following ... third party liability collision ... that: A. specifies that the coverage is not in any manner whatsoever excess insurance to any other exiting policy of Insurance; B. [Shaw GMC] is the first insured ...

b. In the event the nature of the vehicle usage has been deemed to be a Short Term Lease in accordance with paragraph 2(b) above ... the Customer shall provide to [Shaw GMC] the Customer Documentation ... Should the Customer fail to provide the Customer Documentation ... the Customer hereby authorizes [Shaw GMC] to transfer the registration of such Vehicle(s) to the Customer (on a lease basis) and to obtain insurance, as described above, in the name of the Customer ...

10. Accidents

... If any Vehicle(s) sustain any damage, the repairs will be completed by [Shaw GMC] which the Customer will pay for, through insurance, or direct or both.

11. Loss of Use

In the event that any Vehicle(s) are damaged during the term of this Agreement and as a result such Vehicle(s) are not available to [Shaw GMC] for further use while repairs are completed, the Customer shall pay [Shaw GMC] ... the regular daily rental rate ...

12. Diminished Value

In the event that any Vehicle(s) are damaged during the term of this Agreement and the cost to repair such damage exceeds \$2,000, then [Shaw GMC] may require the Customer to pay [Shaw GMC] ... a sum equal to 25% of the actual repair costs ...

15. Liability of [Shaw GMC]

[Shaw GMC] shall not be liable to the Customer or its employees, agents, and passengers for loss or damage to any property left or stored or transported in any Vehicle(s) during, or after, the term of the Agreement even if caused by the negligence of [Shaw GMC]. [Shaw GMC] shall not be liable for any loss or damage, including personal injury or death, incurred by the Customer or its employees, agents and passengers from any cause even if caused by negligence of [Shaw GMC], including any loss or damage occurring as a result of any mechanical failure of any Vehicle(s) ...

7 As well, the Schedule to the Master Rental Agreement (Attention Provision) provided:

This rental agreement is a Schedule to the Master Rental Agreement, both of which impose certain conditions, obligations and responsibilities on the Customer. Among other things, the Customer is responsible for traffic violations, damage to the Vehicle(s), loss of use, diminished value and certain fees, charges and expenses. The Customer must also comply with certain vehicle insurance and registration requirements. The risk and liability associated with this rental remains with the Customer. All of these conditions, obligations and responsibilities are set out in detail in the Master Rental Agreement. By signing this Schedule, the Customer confirms with [Shaw GMC] that it has read, understands and agrees to be bound by these terms and conditions.

8 Polaris and Shaw GMC proceeded to summary trial on the issue of the proper interpretation of the Indemnity Provision.

III. Reasons of the Summary Trial Judge

9 The summary trial judge reviewed the principles of contract interpretation and on the plain, ordinary meaning of the Indemnity Provision, concluded it was possible that third party claims for personal injury or death could be within the scope of the indemnity for "any loss, damage, cost or expense" resulting from the use or operation of a motor vehicle. She then looked to the contract as a whole noting that the Master Rental Agreement required insurance for third party liability be purchased, and that clause 15 excludes Shaw GMC from liability for personal injury or death but that there was no such wording contained in the Indemnity Provision. She noted case authority which read an indemnity provision narrowly and found a narrow reading was also consistent with the Attention Provision in the Schedule which specifies that risk and liability remains with Polaris but does not specify third party liability arising from personal injury or death. She concluded that "any loss, damage, cost or expense" does not include indemnity for third party claims.

10 Alternatively, she held that if she was wrong, clause 14, the Indemnity Provision, is ambiguous and the rule of *contra proferentum*, requires very plain words to establish an unusual liability or onerous indemnity obligation. As Shaw GMC drafted the agreement, the provision should be read in favor of Polaris.

IV. Issues

11 The appellant submits the summary trial judge did not properly apply the rules of contract interpretation:

(i) in concluding the appellant's interpretation would result in an onerous indemnity obligation;

- (ii) in concluding "loss, damage, cost or expense" was broad enough to include third party liability then concluding the indemnity clause did not include third party claims;
- (iii) in considering as relevant that "third party liability" could have been included in the indemnity clause;
- (iv) in stating a clear reference was required to include third party liability;
- (v) in using other clauses of the agreement to narrow the scope of the indemnity clause;
- (vi) in applying the *contra proferentum* rule to interpret the indemnity clause; and
- (vii) the correct interpretation would conclude the respondent is obligated to indemnify the appellant for any liability to third parties for MacDonald's negligence.

V. Parties' Submissions

12 The appellant submits that it makes business sense for the employer to insure for third party liability for its employees' negligence arising from the operation of a leased vehicle. The summary trial judge after concluding it was possible that the Indemnity Provision included third party liability should have stopped there and not gone further with her analysis. The appellant also submits that the *contra proferentum* rule should not have been used where there is no ambiguity. It submits the broad intent of the Indemnity Provision was to include third party liability and that the words "loss, damage, cost or expense" show that included in third party liability was personal injury and death arising from the use or operation of the leased vehicle.

13 In his argument, counsel for the respondent states that the appellant would be vicariously liable for any negligence of the lessor [*sic* lessee] or operator of the vehicle citing section 187(1) of the *Traffic Safety Act*, R.S.A. 2000, c. T-6¹. As such, the appellant Shaw GMC is a proper party to the action.

14 Counsel went on to argue that the appellant as the owner of the vehicle in question "was attempting to shift any and all liability arising from the use and occupation of the leased vehicle onto the lessor Respondent thereby shifting all the risk to the Respondent".

VI. Standard of Review

15 Contractual interpretation is a question of law and is reviewed on the correctness standard: *Double N Earthmovers Ltd. v. Edmonton (City)*, 2005 ABCA 104, 363 A.R. 201 (Alta. C.A.) at para. 16, *aff'd*, 2007 SCC 3, [2007] 1 S.C.R. 116 (S.C.C.).

VII. Analysis

16 The respondent Polaris was MacDonald's employer and MacDonald was acting within the course and scope of his employment at the time of the accident. As such, under general principles of master-servant law, Polaris as the employer is vicariously liable to the injured third parties for the losses caused by the negligence of its employee MacDonald.

17 The parties do not disagree on the applicable legal principles. However, they differ on the application of the principles on the facts of this case.

18 The general rules of contractual interpretation are summarized in Fridman, *Law of Contract in Canada*, 5th ed. (Toronto: Carswell, 2006) at 454-462:

The canons of construction for written documents

- (i) Where there is no ambiguity in a written contract it must be given its literal meaning.

(ii) Words must be given their plain, ordinary meaning, at least unless to do so would result in absurdity.

(iii) The contract should be construed as a whole, giving effect to everything in it if at all possible.

(iv) In cases of doubt, as a last resort, language should always be construed against the grantor or the promisor under the contract; *verba fortius accipiuntur contra proferentem*.

(v) The *ejustem generis* rule.

19 Fridman goes on to discuss exclusion clauses at 518:

Once [an exclusion clause] is included in the contract ... it now seems clear that the courts regard it with critical, even, it might be said, a jaundiced eye. They will approach the interpretation of such a clause strictly, applying the ordinary rules of construction.

20 An often cited case is the Judicial Committee of the Privy Council decision in *Canada Steamship Lines Ltd. v. R.*, [1952] 2 D.L.R. 786, [1952] A.C. 192 (Canada P.C.).

21 In that case, the Crown's employees, by their negligence, brought about a destructive fire but the Crown as lessor failed in its attempt to shift its liability onto the lessee despite an indemnity provision in the lease that provided:

17. That the lessee shall at all times indemnify and save harmless the lessor from and against all claims and demands, loss, costs, damages, actions, suits or other proceedings by whomsoever made, brought or prosecuted, in any manner based upon, occasioned by or attributable to the execution of these presents, or any action taken or thing done or maintained by virtue hereof, or the exercise of any manner of rights arising hereunder.

22 *Canada Steamship Lines* was concerned with exemption of liability from the party's own misconduct. This is not the case here at all. Rather what the appellant Shaw GMC is attempting to do, as between two corporations that are both vicariously liable to the third parties for MacDonald's negligence, is to allocate ultimate liability to Polaris as MacDonald's employer and not to itself as the owner of the vehicle.

23 In *Prudential Assurance Co. v. Walwyn, Stodgell, Cochran, Murray Ltd.* (1985), 50 O.R. (2d) 609 (Ont. C.A.), the Ontario Court of Appeal dealt with the landlord's right to reimbursement based upon section 6.06 of the lease which provided as follows:

The Tenant shall indemnify the Landlord against any claims, including all claims for personal injury or property damage, arising out of the conduct of any work or through any act or omission of the Tenant or any assignee, subtenant, agent, contractor, servant, employee, invitee or licensee of the Tenant, and against all costs, counsel fees, expenses and liabilities incurred from any such claim or any action or proceeding brought thereon.

The Ontario Court of Appeal dismissed the appeal from the trial judge wherein he had ruled in favour of the landlord's right to reimbursement.

24 In the course of its decision in discussing the rationale for strict interpretation of exemption and indemnity clauses, the Ontario court referred to the English Court of Appeal decision in *Gillespie Brothers & Co. v. Roy Bowles Transport Ltd.*, [1973] 1 Q.B. 400 (Eng. C.A.), where Buckley L.J. at 421 stated:

It is not in my view the function of a court of construction to fashion a contract in such a way as to produce a result which the court considers that it would have been fair or reasonable for the parties to have intended. The court must attempt to discover what they did in fact intend. In choosing between two or more equally available interpretations of the language used it is of course right that the court should consider which will be likely to produce the more reasonable result, for the parties are more likely to have intended this than a less reasonable result.

25 Professor Waddams in *Law of Contracts*, 5th ed. (Toronto: Canada Law Book, 2005) suggests at paras. 482-3 that the true rationale is based on unconscionability.

26 Be that as it may, clause 14 is neither unreasonable nor unconscionable and therefore should be interpreted according to its terms "untrammelled by any special rule" (*Prudential Assurance* at para. 12).

27 The summary trial judge reviewed the definitions of "loss", "damage", "cost" and "expense" contained in both the *Oxford English Dictionary OnLine*, 2nd ed. and *Black's Law Dictionary*, 8th ed., and held that it was possible that third party claims arising from personal injury or death fall within the scope of "loss, damage, cost or expense".

28 She went on to state that whether the words "loss, damage, cost or expense" contained in clause 14 include third party claims in this situation must be determined by reference to other provision of the Master Rental Agreement and the provisions in the Schedule.

29 The summary trial judge considered that third party liability is mentioned in clause 4 which requires insurance to be purchased for third party liability with Shaw GMC as the first named insured. It allows Shaw GMC to purchase this insurance on Polaris' behalf should Polaris fail to do so. The summary trial judge then went on to state in para. 25 of her reasons:

If the Indemnity Provision was broad enough to encompass third party liability, Shaw GMC would have no need for such insurance as Polaris would always be the one responsible for the loss.

30 With respect, one, if not the most important, reason for Shaw GMC to insist upon third party insurance is to provide coverage in the event Polaris became insolvent or is otherwise unable to respond to a claim or judgment.

31 The summary trial judge then went on (at para. 26) to note that the Indemnity Provision has no specific reference to third party liability and asserts that clear reference is required to include third party liability citing, *inter alia*, *Canada Steamship Lines*.

32 However, *Canada Steamship Lines* involved a situation where one party was attempting to shift its liability onto another party that otherwise had no liability for the loss in question. This, of course, is not the situation here.

33 Furthermore, the rental agreement in question was a schedule to the Master Rental Agreement and contained the Attention Provision that is quoted in paragraph 7 above which stated in part as follows:

The risk and liability associated with this rental remains with [Polaris].

In our view, this statement is more consistent with a broader as opposed to a more restrictive interpretation of clause 14.

34 It is also significant to note the use of the word "indemnify" in clause 14. The word "indemnify" has been defined as follows:

To reimburse (another) for a loss suffered because of a third party's or one's own act or default.

Garner, Bryan A., *Black's Law Dictionary*, 8th ed. (St. Paul, MN.: Thomson, 2004) at 783-784

35 We are of the view that there is no ambiguity in clause 14 and it therefore must be given its plain and ordinary meaning in favour of the appellant Shaw GMC. Accordingly, there is no need to consider the doctrine of *contra proferentum*.

VIII Result

36 In the result, the appeal is allowed and we direct that the proper disposition to be as follows:

Polaris is obliged to indemnify Shaw GMC pursuant to the Indemnity Provision of the Master Rental Agreement for any liability attributable to MacDonald or Polaris in the main action.

Appeal allowed.

Footnotes

- 1 The actual provision that would govern this type of situation is section 187(2) of the *Traffic Safety Act* and not section 187(1).

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