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BETWEEN:

1956
Feb. 20
Mar. 12

HER MAJESTY THE QUEEN, on the information of the Deputy Attorney General of Canada ..... PLAINTIFF;

AND

MONTREAL SHIPPING COMPANY LIMITED and BLUE PETER STEAMSHIPS COMPANY LIMITED ..... DEFENDANTS.

*Shipping—Loss of cargo—Contract to transport, discharge and deliver cargo above high water mark—Liability for loss suffered in landing operations.*

By a written offer and an amendment thereto made to the King in the right of Canada the defendants, the Blue Peter Steamships Co. Ltd. as contractor and the Montreal Steamships Co. Ltd., as guarantor, agreed for a total payment of $125,000 (the sum to include freight, stevedoring, loading and discharging including the use of any special loading or unloading gear and barges and all other costs and expenses) to transport and deliver aviation gasoline and other cargo to points on Hudson Bay and the Eastern Arctic including the delivery and discharge of 8,000 drums of gasoline "above high water mark at road leading to airstrip at Coral Harbour". Acceptance of the offer and the amendment thereto was authorized by Orders in Council. Pursuant to the undertaking the defendants' schooner arrived at Coral Harbour late in September 1947 at the end of the navigation season. As no docking facilities were available the schooner's captain requested the use of four barges, the property of the Crown, and the aid of a party of Eskimos to bring the cargo ashore. Through the intermediary of the local representative of the Department of Trade and Commerce, the request was granted. Toward the close of the unloading operations, due to rough weather and the leaky condition of one of the barges, two of them capsized and 290 drums of gasoline were lost. After payment to defendants of the agreed sum in an action brought by the Crown to recover the loss the defendants pleaded that their undertaking was to deliver the cargo at ship's side but not otherwise to discharge it and that any loss occurred after the cargo had been

delivered in accordance with the contract as understood and interpreted by the parties; that the landing of the cargo was performed by the agents of the plaintiff acting in performance of their duties while under its direction and control; that the barges were kept and operated by the plaintiff for the purpose of bringing cargo ashore and that the loss was caused by the negligence of the plaintiff's agents.

*Held:* That the general rule that a shipowner's liability is discharged by delivery of cargo at ship's side is susceptible of being varied or extended by pertinent stipulations in the contract or charterparty and the contracting parties are at liberty to stipulate any special terms and conditions they please as to the manner of discharging the cargo. Here the contractor undertook not only to "deliver" in the legal sense of the word but if necessary to provide and pay for the use of any special crew, gear and barges. The captain, the legal representative of the defendants in the performance of the contract, was in charge and control of the unloading job and the plaintiff was entitled to recover from the defendants the amount of the loss.

ACTION for loss of cargo.

The action was tried before the Honourable Mr. Justice Dumoulin at Montreal.

*Jean Tellier, Q.C.* for the plaintiff.

*Leon Lalande, Q.C.* for the defendants.

DUMOULIN J. now (March 12, 1956) delivered the following judgment:

In this information, the Deputy Attorney General of Canada, on behalf of Her Majesty the Queen, seeks to recover from defendants, jointly and severally, a sum of $10,173.49 (as per amendment), for contractual damages suffered.

On June 16, 1947, Montreal Shipping Co., Ltd., acting also for the co-defendant, Blue Peter Steamships Ltd., offered the Department of Trade and Commerce to transport a miscellaneous cargo, comprising *inter alia* 8,000 full drums of gasoline, between Halifax, N.S., and points on Hudson Bay and the Eastern Arctic, the remotest being Coral Harbour on Southampton Island. This offer was duly accepted on July 15, 1947 after authorization by Order in Council P.C. 2588 (not produced but undenied by defendants). In pursuance of Order in Council P.C. 2836, of July 18, 1947, the contract was amended so that the defendant Blue Peter Steamships Co. Ltd., became the contractor, the performance of the contract being guaranteed by Montreal Shipping Co. A lump sum of $125,000

1956

THE QUEEN v. MONTREAL SHIPPING CO. LTD. AND BLUE PETER STEAMSHIPS CO. LTD.

Dumoulin J.

constituted the freight that His late Majesty agreed to pay the contractor. Shipping was to commence during July, 1947, complete delivery to follow as soon as possible thereafter in the same year. For reasons undivulged, the schooner *City of New York,* operated and controlled by defendants, cast anchor off Coral Harbour only on September 24, 1947, as the navigation season in those sub-Arctic seas was drawing to a close.

No docking facilities whatever exist at Coral Harbour so that unloading operations, from ship's side to shore, necessitate the use of lighters or scows. Captain L. Kenedy, master of M.V. *City of New York,* undermanned with a crew of eight men, and having no auxiliary transports at his disposal, requested the enlistment of an Eskimo unloading party and the help of four barges belonging to the Department of Trade and Commerce. Amongst other items, the freightage for Coral Harbour included 8,000 drums of gasoline destined for the R.C.A.F. base, some six miles inland. The requisite assistance, namely natives and scows, being procured through the intermediary of an employee of Trade and Commerce, C. W. Kitson, landing operations began on September 25, ending on the 30th of that month. On September 28 and 30, as detailed below, two barges capsized, with an ensuing loss of 303 drums of fuel. Plaintiff consequently seeks indemnification for:— (*a*) 12,470 gallons of gasoline, the amended and agreed value of which is: $3,329.49; (*b*) 290 drums admittedly worth: $2,320 at $8 per unit; (*c*) $104 paid to the Eskimos for salvage of 13 drums, uncontested; (*d*) freight paid to defendants for 68 undelivered tons of gasoline: $4,420, categorically denied in fact and law. It is hardly necessary to point out that the former admissions are restricted to the arithmetical accuracy of the figures and market value of the merchandise and prices listed.

The lump freight price was paid to contractors in three instalments of respectively $60,000 on or about September 11, 1947; $50,000 in October of the same year; and $15,000 on April 17, 1948. It was only on February 14, 1949, that a claim for $10,834.40 was sent to Montreal Shipping Co. on behalf of the Royal Canadian Air Force (Exhibit C). In a letter dated May 10, 1949, filed as Exhibit 2, the contractors repudiated all liability.

Essentially, the moot point centers upon the interpretation of the contract, Exhibit 1, as setting forth the reciprocal obligations of the parties thereto and their extent.

According to the information, the instrument of June 16, 1947, and its subsequent amendment, dated July 5, clearly obliged the ship owners to "deliver and discharge above the high water mark on the road leading to the air strip at Coral Harbour" 8,000 full drums of gasoline. Defendants counter that the offer and acceptance speak for themselves and deny all allegations of plaintiff's paragraph 1 which would not "conform strictly to the said offer and acceptance". The implication flowing from defendants' stand is, in effect, that their contractual undertaking was to deliver the cargo at ship's side but not to otherwise discharge it. Hence, their contention "that any loss suffered by the plaintiff occurred after the cargo had been delivered . . . in accordance with the contract as understood and interpreted by the parties . . ." (statement of defence, paragraph 11). Hence, also, their other statement (paragraph 10) "that the landing of cargo from the M.V. *City of New York* at Coral Harbour was performed by agents . . . of the Plaintiff acting in the performance of their duties as such and that the Eskimos and others engaged in transporting the cargo . . . to the landing stage were hired by and were entirely under the direction and control of the said agents . . ."

Defendants further allege (paragraph 6) that the four barges previously mentioned were "kept and operated by the Plaintiff at Coral Harbour for the purpose of bringing cargo ashore, there being no dock or wharf facilities there and that it was well understood by the parties to the said contract that without such facilities cargo could not be landed at Coral Harbour . . ."

Finally, defendants contend that the loss suffered by plaintiff was caused by the negligence and lack of care of her agents in failing to properly navigate the delivery barges or in using one with too much bilge water in her or, again, in failing to tow a loaded barge before a breeze had time to turn into a gale.

The plaintiff's attitude in reply to the statement of defence may be summarized in paragraph 4, where it is said that "the unloading of the cargo to shore was the responsibility of the defendant and that whoever took part in the

1956

THE QUEEN v. MONTREAL SHIPPING CO. LTD. AND BLUE PETER STEAMSHIPS CO. LTD.

Dumoulin J.

said unloading did so at the exclusive request and under the direction, control and responsibility of the master of the ship, in the name and under the sole authority of the defendant, for the purposes and in the interest of the latter."

The issue being joined on this statement of facts, three points remain to be elucidated: (*a*) the meaning and portent of the contract as amended; (*b*) the responsibility accruing from the use of lighters at Coral Harbour and the hire of an Eskimo unloading party; (*c*) did the payment by plaintiff of the freight price before any formal claim was presented to defendants constitute an acknowledgment of the satisfactory execution of the contract?

(*a*) The third paragraph on page 2 of the acceptance of tender, which has been alternately termed "the contract" and is tantamount to a charterparty, Exhibit 1, reads:

> Cargo discharged at the following points shall be placed as follows:— . . . above high water mark at road leading to air strip at Coral Harbour . . .

On page 2, paragraph 3, of the amendment dated July 5 we also find the undergoing paragraph, which affords no difficulty of interpretation, at least to my mind:

> His Majesty agrees to pay the contractor for the above services the total lump sum of $125,000, the said sum to include freight, stevedoring, loading and discharging, including the use of any special loading and unloading gear and barges, port charges, piloting, special crew and all other costs and expenses; . . .

I fail to see, in the presence of such plain and easily understood expressions as "cargo discharged above the high water mark at road leading to air strip" and "the total lump sum will include . . . loading and discharging, including the use of any special loading and unloading gear and barges, . . . special crew", how any other conclusion might be reached but that the contractors did in fact undertake, not merely to deliver in the legal sense of the word, but also to discharge the cargo and, if necessary, to provide and pay for the use of any special crew, gear, and barges. Surely experienced mariners, as the defendants are presumed to be, inquired or were told about conditions obtaining at Coral Harbour before affixing their signature to the contract, and the result of this inquiry is clearly shown in the special obligations assumed by the contractors.

(*b*) It has been said that the ship concerned in the present case, viz. M.V. *City of New York,* had a very scanty crew of only eight hands. Mr. C. W. Kitson, who on September 24, 1947 represented the Department of Trade and Commerce at Coral Harbour, testified at trial that Captain L. Kenedy, realizing the shortage of his personnel and the lateness of the season, asked for the use of the government barges, and also for some additional man power in order to speed up unloading.

Mr. Kitson swears that what he undertook to do was done only at the urging of Captain Kenedy, without assuming any obligation, and never giving to understand that the Department of Trade and Commerce would in any way be responsible. Moreover, Kitson cautioned Kenedy against using one of the four barges that leaked rather badly. Mr. Kitson, with the assistance of the Hudson Bay post agent, obtained native help, an improvised crew of Eskimos, but never presumed giving any directions or controlling in any manner the landing operations. As a matter of fact, on the two fateful days, September 28 and 30, this witness was not at Coral Harbour.

On the two last mentioned days, to quote from a copy of the log filed as Exhibit 3, unfortunate incidents occurred, occasioning the loss of about 303 full drums of gasoline. The first mishap, namely that of September 28, according to Captain Kenedy's entry in his journal, was attributable to the fact

> . . . that the barge had a lot of bilge water in her and she would take a big list to her heavier side and the drums slid off. After a launch took her in tow she got beam to and slid half her cargo overboard.

The entry for September 30 reads:

> Loaded 100 on leaky scow, 200 on each of others . . . The last one was leaking bad and they left it here for the nite. During the nite she half filled, listed on her side and lost all her load but one drum.

Yet, whatever the causes of these incidents, they can have no bearing on this decision if Captain Kenedy, as the legal representative of defendants and in the performance of the contract, remained in charge of and kept full control over the unloading job. Here again the plain words of the contract entrust contractors with this obligation.

1956

THE QUEEN v. MONTREAL SHIPPING CO. LTD. AND BLUE PETER STEAMSHIPS CO. LTD.

Dumoulin J.

Captain Kenedy, it may be interesting to note, was not heard at trial, at the start of which an application was made to have him examined later if found necessary, but this demand was waived as the case ended.

(*c*) The president of Montreal Shipping Co. Ltd., Mr. Knowles, at the time general manager, admitted in court that the two first instalments of $60,000 and $50,000 requisitioned on September 11 and October 7, 1947, did not include any deliveries made at Coral Harbour. The last payment on or about April 17, 1948, applied not only to the Coral Harbour part of the contract but also to the entire composite movement that included five ships. I am unable to agree with defendants' statement that these payments, in the absence of formal acknowledgment, should be construed as a waiver of plaintiff's claim. The complicated and interlocking machinery of government accountancy must be borne in mind, and I think that the necessary allowances should be extended in the present contingency.

I mentioned above that a formal claim was filed on February 14, 1949 with defendants (Exhibit 3), who in their reply dated May 10, 1949 (Exhibit D) did not even allude to the payment of the freight price as constituting an acknowledgment.

At trial it was admitted that $3,329.49 represented the true value of 12,470 gallons of gasoline lost; that $2,320 compensated for 290 empty drums of gasoline at $8 apiece; and also that a sum of $104 had been paid to the Eskimos for the salvage of thirteen drums after the departure of M.V. *City of New York*.

Wing Commander Arthur Tinkler, R.C.A.F., then at Coral Harbour, checked the loss shortly after October 30 and stated at trial that it amounted to 290 drums of gasoline.

The last and largest amount sought by plaintiff is no less than $4,420, which would be equivalent to the transportation costs of 68 undelivered tons of gasoline. The present contract was made for a lump freight price, without any itemization being given for the footage or cubic rate of any of the miscellaneous items comprising the cargo. I asked the learned counsel for plaintiff about the method used in computing this claim. He explained that this sum was

arrived at by dividing the total freight price of $125,000 by the quantity of gasoline drums to be delivered at Coral Harbour, 8,000, subsequently multiplying the quotient by 290, thirteen drums having been salvaged. Arithmetically, this may be true but affords me very little ground for accepting such a figure as the correct transportation rate for 290 drums of gasoline in a lump price contract, with no specific tariff or charge for any chattel carried.

After due consideration, it seems hard to deny that the shipping of 68 tons of gasoline contained in three hundred drums should entail some pecuniary appreciation, notwithstanding Mr. Knowles' testimony to the contrary. The difficulty lies in the fact that no definite basis of calculation appears in the evidence. With some reluctance, I am of opinion that, should I apportion the loss sustained by the Crown on that score at five hundred and eighty dollars ($580), or two dollars per drum, I would still remain within reasonable bounds. Should either party be dissatisfied with this finding, each will be at liberty, within a period of 60 days, to ask for and obtain a reference before the Registrar of this Court.

The learned counsel for defendants, in his argument, contended that the general rule governing the discharge of cargoes could not be superseded by the contract under examination, and he referred the Court especially to Carver's *Carriage of Goods by Sea,* 9th Edition (1952) at page 703, and to Halsbury's *Laws of England,* Volume XXX, No. 683. These quotations must be supplemented by a more extensive perusal of those authors. Halsbury and Carver are at one in holding that the discharge of cargoes is regulated by maritime rules or by the custom of the port only in the absence of contract or charterparty expressing the intentions of the parties.

I quote Halsbury, Volume XXX, pages 532-533, No. 684:

> 684. The position of the parties may be materially modified by the terms of their contract, or by the custom of the port of discharge . . . On the other hand, the shipowner's duty may not cease at the ship's side; he may be required to place the goods in the lighter alongside the ship or to deliver them on to the quay without any assistance from the consignee. Where the goods have to be delivered on to the quay, the shipowner must

1956

THE QUEEN v. MONTREAL SHIPPING CO. LTD. AND BLUE PETER STEAMSHIPS CO. LTD.

Dumoulin J.

provide, at his own expense, any lighters that may be necessary; he may also be bound to stack the goods, and is not necessarily discharged by delivering them on to the nearest available part of the quay.

Halsbury, *op. cit.*, pages 365 and 366, No. 542, goes on to say:

SUB-SECT. 4.—*The Construction of Charterparties.*

(*i.*) *General Principles of Construction.*

542. A charterparty, like any other mercantile document, is to be construed so as to give effect, as far as possible, to the intention of the parties as expressed in the written contract. The rules of construction to be applied are the same as for any other written instrument, and may be shortly stated as follows, namely:—

(1) The words used are to be understood in their plain, ordinary, and popular meaning, unless the context shows that the parties, for the purposes of their contract, intended to place a different meaning upon them, or unless, by the usage of some particular trade, business, or port, they have to such an extent acquired a secondary or technical meaning that it is clearly the meaning intended by the parties.

Carver at page 703, under the heading "Shipowner Generally Discharged by Delivery at Ship's Side", has this to say:

Generally speaking, the shipowner's obligation is performed by a delivery at the ship's side, or, at most, on a quay. And if the consignee sends lighters for the goods, a delivery into the lighters, to his agents or servants, as a rule terminates the shipowner's responsibility. But his responsibility may be extended by custom.

Such a liability, I venture to think, is also susceptible of being varied or extended by pertinent stipulations in the contract or charterparty. In order to obtain a fair knowledge of Carver's opinion in the matter, it is necessary to read the entire chapter entitled "Mode of Discharge", comprising pages 700 to 703. It will be seen this authority corroborates Halsbury in holding that the contracting parties are at liberty to stipulate any special terms and conditions they please, as to the manner of discharging the cargo.

The contract entered into in the present case manifestly evidences the common intentions of both parties and, therefore, is in full accord with the doctrine advanced by Halsbury and Carver.

For the preceding reasons, I decide that plaintiff is entitled to recover from defendants, jointly and severally:

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|---|---|
| (*a*) the price of 12,470 gallons of gasoline, valued at 26·7 cents per gallon | $3,329.49 |
| (*b*) the value of 290 drums at $8 apiece | 2,320.00 |
| (*c*) $104 paid to the Eskimos for the salvage of thirteen drums | 104.00 |
| (*d*) costs of transportation, 60 tons of undelivered gasoline, paid by defendants and assessed at $2 per drum, 290 drums | 580.00 |
| | $6,333.49 |

Defendants jointly and severally will, therefore, pay to the plaintiff the sum of $6,333.49 with costs to be taxed in the usual way, the right of both parties to a reference before the Registrar of the Court regarding item (*d*) duly reserved during 60 days.

*Judgment accordingly.*