
Canadian General Electric Co. (Plaintiff) v. The "Lake Bosomtwe" et al (Defendants)

Jackett, P., in Admiralty—Ottawa, October 1, 13, 1970.

Shipping—Practice—Decree awarding damages sustained by cargo—Ex parte order directing reference to assess damages and interest—Right of referee to award interest.

The writ of summons in this Admiralty action was endorsed as a claim for damages "sustained by cargo". The trial judge found defendant liable in tort for the damages to the cargo and gave leave to the parties to be heard respecting the assessment of such damages. Subsequently on plaintiff's ex parte application he referred the questions of damages *and interest* to a referee, who assessed the damages at \$76,233 and reported that plaintiff was also entitled to interest thereon at 5% from the date the goods should have been delivered.

Held, the court's decree was limited to the plaintiff's claim for the damages to the cargo, and therefore the referee could not validly award interest on such damages. The trial judge's ex parte order referring interest as well as damages to the referee should in the circumstances be ignored.

Great Lakes S.S. Co. v. Maple Leaf Milling Co. (Ont. C.A.) [1926] 1 D.L.R. 675, applied; Can. Brine Ltd v. The Scott Misener [1962] Ex.C.R. 441, referred to.

MOTION.

B. A. Crane for applicant.

B. H. Wilson contra.

JACKETT, P.—This is a motion by the defendant for an order varying a report of the District Registrar. To understand what is sought and the problems raised thereby, it is necessary to review what has happened in this action.

The relevant steps in the action may be summarized as follows:

1. On January 10, 1969, Pottier, D.J.A., filed his "Decision", by which he expressed his finding, following the trial of the action, that the

defendant Pickford and Black Limited is liable in tort for damages sustained by cargo belonging to the plaintiff on a ship as a result of defective stowage. The decision concluded as follows:

The damage to the cargo was quite extensive. I will hear parties as to assessment thereto.

The plaintiff will have judgment with costs.

2. On January 20, 1969, this decision was reflected in an "Order" signed by the District Registrar, that had been countersigned by the District Judge and "Consented to" by a solicitor for the defendant, and that reads in part as follows:

... His Lordship was pleased to reserve his Decision and subsequently to wit on the 10th day of January, 1969, having filed his said Decision wherein he allowed the claim of the Plaintiff against the Defendant, Pickford & Black Limited, with leave to the parties to be heard before him with respect to the assessment of damages to the cargo owned by the Plaintiff.

NOW UPON MOTION of Gordon S. Black on behalf of the Plaintiff,

IT IS ORDERED that the Plaintiff's claim herein against the Defendant be and the same is hereby allowed with costs;

AND IT IS FURTHER ORDERED that the Parties may apply to the Court for the purpose of having the damages to the cargo assessed.¹

3. In February, 1969, an appeal was instituted from the above decision to the Exchequer Court.

4. On May 8, 1969, an order was made by Pottier, D.J.A., on an *ex parte* application by the plaintiff, "that those items of damages and interest which are the subject of dispute between the parties be referred to Linden M. Smith, Registrar of the Nova Scotia Admiralty District, to report in accordance with the Rules of Court".

5. On May 13, 1969, Mr. Smith made a report reading, in part:

WHEREAS the decree of the Judge in Admiralty for the Nova Scotia Admiralty District pronounced in favour of the Plaintiff and condemned the Defendant, Pickford & Black Limited, in the amount to be found due to the Plaintiff and in costs and ordered that an account should be taken and referred the same to the Registrar to report the amount due;

NOW I do report that I have carefully examined the arguments in support of the claim of the Plaintiff and have heard Gordon S. Black, Q.C., on behalf of the Plaintiff and Donald D. Anderson, Esq., on behalf of the Defendant. I find that there is due to the Plaintiff the sum of \$76,233.52 plus costs in the amount of \$3,020.26, which sum includes the cost of this reference. The Plaintiff is also entitled to interest at the rate of 5% on the sum of \$76,233.52 from the last day of April, 1965, which is the latest date when the goods, which were damaged, should have been delivered at Ghana, until the date of payment.

* * *

¹ The endorsement on the writ says *inter alia* that "The plaintiff claims the sum of \$260,000.00 for damages sustained by the said cargo and to have an account taken thereof, and for costs". Paragraph 10 of the statement of claim reads:

10. As a result of the aforesaid negligence of both defendants or either of them and of the breach of contract by the defendant vessel, the plaintiff sustained severe damage to the equipment and machinery referred to herein and claims against the defendants or either of them the sum of Two Hundred and Sixty Thousand Dollars (\$260,000.00) or such lesser sum as may be established at the trial of this action or in subsequent reference for the assessment of the said damages.

There were three items in dispute.

* * *

The Plaintiff claims interest on the Claim for Damages from the date when the goods should have been delivered. It is my opinion that this item should be allowed (see Mayne & MacGregor on Damages—Twelfth Edition, Page 285 at Paragraph 286).

6. The present application was launched, by a notice bearing date May 23, 1969, and reading in part:

TAKE NOTICE that on a date to be set by the District Judge in Admiralty, the Defendant will move the District Judge in Admiralty for an Order varying the report of the Registrar, dated the 13th day of May, 1969. The items objected to are as follows:

1. The Registrar's report that the Plaintiff was entitled to interest at the rate of 5%.

2. The Registrar's report that the Plaintiff was entitled to interest from the latest date when the goods should have been delivered in Ghana, until the date of payment.

7. On September 19, 1969, the defendant's appeal to the Exchequer Court was allowed.

8. On June 25, 1970, on an appeal by the plaintiff to the Supreme Court of Canada, that court gave judgment restoring the judgment of Pottier, D.J.A.

9. On October 1, 1970, this motion was for the first time presented to this court and argued before me.

I should say at this point that when, at the outset of the argument, having read the "Order" reflecting the "Decision" that Pottier, D.J.A. had rendered, I asked to be referred to the order of the court referring the matter of damages to Mr. Smith as referee, I was informed by counsel for the defendant, counsel for the plaintiff apparently concurring, that there was no such order but the parties had arranged between themselves for the reference and that it was only when I came to review the court file in the course of considering the matter, after argument, that I discovered the *ex parte* order of May 8, 1969, to which I have already referred.

Provision for an appeal from a report of a registrar on a reference under Rule 125 of the Admiralty Rules is to be found in Rule 129, which reads as follows:

129. Within fourteen days after service of the notice of the filing of any report, any party may, by a motion, setting out the grounds of appeal, of which at least eight days' notice is to be given, appeal to the Court against any report, and upon such appeal, the Court may confirm, vary or reverse the findings of the report and direct judgment to be entered accordingly or refer it back to the referee for further consideration and report.

The time for making the appeal motion had, of course, expired before it was made before me. Counsel for the parties agreed that the court can extend the time. (See Rule 200.) I have considered the submissions made with regard to the question whether, in the circumstances of this case, that time should be extended, and I have concluded that I should, nevertheless, extend the time and I do so extend it.

There is only one point of substance involved in the appeal and that is whether the District Registrar erred in awarding to the plaintiff interest on

the sum of \$76,233.52 from April 1, 1965, in respect of the period prior to the time when he made his report. It is common ground that any interest that might be claimed under the report in respect of a period subsequent to that time has been paid. I am informed that the amount of interest in controversy is over \$15,000.

I am relieved of the responsibility of reviewing the authorities referred to by the parties on the question as to the general principle involved as that has been done recently in this court by my brother Wells in *Canadian Brine Ltd v. The Ship Scott Misener*² where he concluded "that there is a discretion in a Court of Admiralty to award interest whether the rights being dealt with arose *ex contractu* or *ex delicto*", and that no claim need be made for such interest in the statement of claim because such "interest is not granted as something apart from the damages but as an integral part of them". Some additional light is also to be found in a general review of the law concerning interest by Lord Denning M.R. where he says that the Court of Admiralty "followed the civil law and gave interest on damages whenever the non-payment was due to the wrongful delay of the defendant. To use the Latin phrase, whenever the non-payment was *ex mora* the obligor.³ *Ex mora* means, of course, 'on account of the delay'." Lord Denning tells us in the same passage that

- (a) "When a profit earning ship was sunk in a collision, the Court of Admiralty awarded interest on the value of the ship . . . from the date of the loss to the date of the trial,"
- (b) "When a ship was not sunk, but only damaged, the Court of Admiralty awarded interest on the cost of repairs, but only from the time that the repair bill was actually paid, because that was the date from which the plaintiff had been out of pocket," and
- (c) "Where there was loss of life in a collision, the Court of Admiralty allowed interest only from the date of a registrar's report."

It appears also that "Interest is generally allowed on the amount awarded for cargo lost or damaged from the date at which it is assumed it would have been received at the end of the voyage".⁴

It appears therefore that, according to the principles administered by the Court of Admiralty, which principles are the principles that must be applied in an Admiralty case in this court, a successful plaintiff is entitled not only to be indemnified in respect of the actual damage to his property sustained as a result of a breach of contract or a tort, but is also entitled to compensation in the form of interest in respect of the delay in payment of such damages to the extent that the court decides in its discretion that he ought to be so compensated in the circumstances of a particular case. (Such interest is to be distinguished from interest on a judgment, which is quite a different matter. What we are concerned with is "interest" in respect of a period before judgment.)

² [1962] Ex.C.R. 441.

³ [1970] 1 All E.R. 1202 at pp. 1206-07.

⁴ Roscoe's Admiralty Practice, 5th ed., page 365. See also the judgment of the Supreme Court of Canada in *Charles Goodfellow Lumber Sales Ltd v. Verreault et al* (1970).

Futhermore, it would seem obvious that the discretion as to whether any such interest to compensate for delay in payment of damages is to be awarded is one that is to be exercised by the Court at the time that it renders judgment in the action unless, of course, the Court, by its judgment or otherwise, refers the question of damages to a referee in such general terms as to leave the discretion to the referee. This distinction was made by the Appellate Division of the Supreme Court of Ontario in *Great Lakes SS. Co. v. Maple Leaf Mllg. Co.*⁵ where Mulock, C. J. O., with whom Magee, Ferguson and Smith, JJ. A., concurred, disposed of the matter there in question, at page 676, as follows:

The plaintiff company appealed from the report on the ground that the Master erred in not allowing interest on the monies expended for the repair of the said damage. The appeal was heard by Riddell, J., and was dismissed, and this appeal is from such dismissal, and the question for this Court to determine is whether the Master should have allowed interest on the said expenditures.

The judgment does not declare the plaintiff company entitled to recover damages which it may have sustained because of the injury to the steamer, but merely that it is entitled to recover "the damage to the steamer". This language limits the amount recoverable to the amount of actual damage to the steamer. Interest on the expenditure in repairs may be damage to the plaintiff company, but is not "damage to the steamer".

Applying this decision, much depends upon how the plaintiff frames his "claim", by the endorsement on his writ of summons and by his statement of claim, and upon how the Court's decree disposing of the action is framed. If the plaintiff's "claim" is for the damages *sustained by the plaintiff* as a result of the tortious injury done to his goods, it is a claim not only for the damages sustained by his goods but for interest on the amount of such damages as compensation for the period from the time when he received, or would have received, the damaged goods until he is paid the amount of such damages. If, on the other hand, the plaintiff's claim is for the damages *sustained by his goods*, it is a claim only for such damages. This difference in how the "claim" may be framed is, of course, of great importance, because if the "claim" is framed in the broader way, the defendant will be on warning that he must defend himself against an implied claim for interest whereas, if the "claim" is framed in the narrower way, the defendant is not faced with any such claim. This difference in how the "claim" may be framed is also of importance because, if the Court's "Decree" follows the suggestions contained in Form 67 of the Admiralty Rules, it would be framed to read that "The Court pronounced in favour of *the plaintiff's claim* and condemned the defendant in the amount to be found due to the plaintiff". (The italics are mine.)

In this case, the plaintiff's claim is defined by the endorsement on the writ of summons as being "for damages sustained by the said cargo" and, while the learned trial judge did not follow the exact terms of Form 67, he clearly adverted to the claim as so framed by the writ of summons, when, having allowed "the Plaintiff's claim", he ordered that the parties might apply to the Court for the purpose of having "the damages to the cargo" assessed.

⁵ [1926] 1 D.L.R. 675.

Looking only at the learned trial judge's decision and the order reflecting that decision, my conclusion would be, for the reasons that I have just given, that the Court's decree in favour of the plaintiff was limited to the plaintiff's claim for the damages to the cargo.⁶ If that conclusion is correct, the District Registrar could not validly, as referee, have awarded any interest on such damages. The referee obviously has no power to do anything other than determine the amount of the "plaintiff's claim" in favour of which the Court has pronounced.

However, there is one further document to which I must refer, namely, the *ex parte* order of May 8 1969, by which Pottier, D. J. A. referred to the District Registrar for a report—"those items of damages *and interest* which are the subject of dispute between the parties". (The italics are mine.) My concern with this order is, of course, that it is an order made by the learned trial judge himself that would appear to show that he had in mind that he had given judgment for "interest" as well as damages. If the order had been "consented to" by the defendant, as was the order reflecting the trial judgment, I should have been concerned as to whether it did not evidence that the Court and both parties had understood the "claim" to include interest from the inception of the action, and in particular, throughout the trial, so that the pleadings and the order disposing of the action should be amended to make them conform with that understanding. However, not only does it appear from the order itself that the plaintiff applied *ex parte* for the order of May 8, 1969, but it appeared on the argument before me that the defendant was not aware of its existence. In these circumstances, I propose to ignore it in reaching my conclusion on this appeal.

The judgment on the appeal that I propose, therefore, to pronounce is that the appeal be allowed with costs, which will be fixed at \$500, and that the District Registrar's report of May 13, 1969, be varied by deleting the words "from the last day of April, 1965, which is the latest date when the goods, which were damaged, should have been delivered at Ghana," from the second paragraph thereof and by substituting the words "from the 13th day of May, 1969, the date of this Report" therefor.

In making such a variation in the District Registrar's report, I must not be taken as making a finding that the report validly contained a provision for payment of interest for the period following the making of the report. That question was not in controversy on this appeal.

I shall defer pronouncing judgment to give the parties an opportunity to make representations in writing concerning the manner in which I propose to word it and concerning my proposed provision concerning costs. Such representations may be made by letter addressed to the Administrator of the Court at the Ottawa Registry and sending a copy to the other party. If either party does not make any such representation by a letter received within two weeks from the date of these Reasons, it will be assumed that it does not desire to do so.

⁶ If it were not for the decision of *Great Lakes SS. Co. v. Maple Leaf Mfg. Co.* (*supra*), I should have had to decide whether a claim for "damages to cargo" should not be read as impliedly including all the plaintiff's damages flowing from the damage to the cargo. As a trial judge, however, I am of the view that I should follow the Appellate Division decision, which, as I understand it, is directly in point.