
THE ONTARIO ADMIRALTY DISTRICT

1964
Dec. 10

1965
Mar. 5

BETWEEN:

CANADA MALTING CO. LIMITED .....PLAINTIFF;

AND

THE BURNETT STEAMSHIP CO. LIMITED AND CHAS. H. TREGENZA CO. LTD. ..... DEFENDANTS.

Shipping—Carriage of goods—Damage to goods—Transfer of risk in f.o.b. contracts—Application to add party as plaintiff—Grounds for refusing to add party as plaintiff on his consent—Expiry of limitation period for instituting action—Application to add as plaintiff principal for whom present plaintiff acted as agent—Order that party be added as plaintiff on terms—Water Carriage of Goods Act, R.S.C. 1952, c. 291, Rule 6—Bills of Lading Act, R.S.C. 1952, c. 16, s. 1.

This is an application brought by the plaintiff for an order adding a party, Oland & Son Limited, as a plaintiff in this action, on the consent of the party sought to be added. The defendants resisted the application on the ground that the limitation period set out in Rule 6 in the schedule to the *Water Carriage of Goods Act*, R.S.C. 1952, c. 291 has expired and any cause of action that might have existed between the

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party sought to be added as a plaintiff and the defendants is now barred.

The evidence on the application established that the plaintiff was the consignor of a cargo of malt shipped from Port Arthur to Oland & Son Limited at Halifax on board a steamship owned by the defendant, The Burnett Steamship Co. Limited and chartered by the defendant Chas. H. Tregenza Co. Ltd. It is not clear when title to the malt passed from the plaintiff to Oland & Son Limited, the party sought to be added as a plaintiff. This action was instituted as a consequence of the damaged condition of the malt on arrival at Halifax.

Held: That *prima facie,* in f.o.b. contracts the general rule appears to be that the risk passes on the shipment of the goods, that is to say, as soon as they are delivered to the carrier.

2. That the bill of lading in this case indicates that it was taken by the plaintiff acting as agent for Oland & Son Limited, the purchaser of the malt. This raises the question as to who the plaintiff in this action should be.

3. That the Court is precluded from granting the order applied for only if by doing so the defendants are deprived of some legal defence which they now have or the plaintiff would thereby be permitted to set up a new cause of action, by the addition of Oland & Son Limited as a plaintiff.

4. That the bill of lading was entered into by the plaintiff as an agent and the only person for whom it could be an agent in the circumstances is Oland & Son Limited to whom the goods were being consigned. From a very short time after the cargo had been delivered in a damaged condition at Halifax the defendants knew that a claim was being asserted against them, and the addition of Oland & Son Limited as a plaintiff is merely to add and bring before the Court the real principal in the case for whom the present plaintiff acts as an agent.

5. That as agent for Oland & Son Limited the plaintiff was the contracting party and it is advisable that it should continue in the case because of that.

6. That in permitting Oland & Son Limited to be added as a plaintiff, the defendants are not being deprived of any real defence they have to this action, nor is any new cause of action being set up.

7. That there will be an order *nunc pro tunc* as of the issue of the writ permitting Oland & Son Limited to be added as a party plaintiff and for the necessary amendments to be made to the pleadings, the order being on the terms that the plaintiffs will not be entitled to any further costs against the defendants than the present plaintiff would have been entitled to if it had gone to trial and had succeeded.

APPLICATION for an order *nunc pro tunc* to join a plaintiff to the action.

The application was heard by the Honourable Mr. Justice Wells, District Judge in Admiralty for the Ontario Admiralty District, at Toronto.

P. F. M. Jones for plaintiff.

A. J. Stone, Q.C., for the defendant, The Burnett Steamship Co. Limited.

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J. W. Macdonald for the defendant, Chas. H. Tregenza.

The facts and questions of law raised are stated in the reasons for judgment.

WELLS, D.J.A. now (March 5, 1965) delivered the following decision:

This application was brought by the plaintiff and heard on Thursday the 10th Deceember last for an order that Oland & Son Limited be joined *nunc pro tunc* as a plaintiff in this action and for an order amending the style of cause herein accordingly and for an order permitting the parties hereto to deliver such amended pleadings as to them seem necessary.

The material before me on this application consists of an affidavit by one Reginald James Thomas of Toronto, who is the comptroller of the plaintiff company. Mr. Thomas was cross examined on his affidavit and the facts as set out by him appear to be quite simple and are not controverted, as far as I am aware. They are that the action arises out of damage caused to a cargo of malt shipped by the plaintiff from its elevator at Port Arthur to Oland & Son Limited at Halifax, Nova Scotia on board the steamship *Tynemouth*. The plaintiff was the consignor of the said cargo, the Burnett Steamship Co. Limited is the owner of the ship *Tynemouth* and the defendant Chas. H. Tregenza Co. Ltd. was the charterer of the ship at the time. Oland & Son Limited who seeks to be added was the purchaser of the malt and is a brewer in Halifax.

Paragraph 5 of Mr. Thomas' affidavit I think sets out the gist of the matter which was before me, when he says as follows:

> I am informed by my solicitors and verily believe that upon the information available to them at the time the writ was issued, it appeared that the plaintiff was the sole owner of the goods. It now appears that title to the goods may have been in Oland & Son Limited at the time of the loss, and accordingly, the presence of Oland & Son Limited is necessary in order to enable the court effectively and completely to adjudicate upon the questions involved in this action.

Oland & Son Limited has also signed a consent to being joined as a plaintiff in this action.

As I have already said Mr. Thomas was cross examined on his affidavit, but it would appear that the question of when the title in the malt, which was the subject matter

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of this dispute, passed from the present plaintiff to Oland & Son Limited in Halifax is far from clear. The cross examination on the affidavit of course, was not an examination for discovery and was not treated as such by anyone concerned. It is interesting however to look at one of the Bills of Lading which was filed as a specimen before me. What I take to be Exhibit 1 in the cross examination is a contract dated July 23, 1962, which is said to cover the purchase of malt from Canada Malting Co. Limited by Messrs. Oland & Son Limited, Halifax, Nova Scotia. The amount is Sixty Thousand (60,000) bushels Screened Old Crop Brewers' Malt at a price of $2.01 net cash per bushel of 36 pounds, f.o.b. Port Arthur. All the malt covered by the contract was to be ordered out for delivery prior to November 30, 1962. The bill of lading is also instructive. It is dated at Port Arthur on September 24, 1962 and covers goods shipped in apparent good order and condition from the port of Port Arthur, Ontario, by Canada Malting Co. Limited as agent and forwarder for account and at the risk of whom it may concern, on board the vessel S.S. *Tynemouth* whereof Capt. J. Barrass is Master, now in the port of Port Arthur, Ontario and bound for Halifax, Nova Scotia, the property herein described to be delivered as agreed herein in like order and condition, to the order of Oland & Son Limited, or his or their assigns at Halifax, N.S., upon payment of freight and charges as noted below.

The specimen Bill of Lading which was shown to me covered 10,000 bushels or 360,000 lbs. of blended brewers malt. The bill of lading was accepted and signed by someone whose signature is illegible to me, as agent for the vessel.

Normally, apart from questions of laches there would not be much exception taken to an application of this sort, particularly in view of Section I of the *Bills of Lading Act*. However, a real objection is made by the defendants on the basis of the rules set out in the schedule to the *Water Carriage of Goods Act*, which is Chapter 291 R.S.C. 1952. These rules embody what are normally called the Hague Rules and are a series of rules relating to bills of lading and other matters which were designed to liberalize and bring up to date the Maritime Law as it then stood in several

jurisdictions. They were also designed of course to create some uniformity.

Rule 6 deals with the question of loss or damage and notice thereof and the third paragraph of that rule is as follows:

> In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.

This loss of course, occurred in the year 1962. The writ was issued on November 27, 1963 and it would appear that if the rule does create a limitation of action, it has been greatly exceeded.

Having referred to many authorities on the subject it appears to me that the most succinct and practical statement of the principles which governs the Common Law Courts in the exercise of their jurisdiction when dealing with a Statute of Limitations, is set out by Scruton L.J. in the case of *Mabro v. Eagle Star and British Dominion Insurance Co.*[1] where he said this:

> In my experience the Court has always refused to allow a party or a cause of action to be added, where if it were allowed, the defence of the Statute of Limitations would be defeated. The Court has never treated it as just to deprive a defendant of a legal defence. If the facts show either that the particular plaintiff or the new cause of action sought to be added are barred, I am unable to understand how it is possible for the Court to disregard the statute.

An examination of the contract of purchase and sale of the malt in question, of which the shipment on the *Tynemouth* was but a part, discloses that some 60,000 bushels were sold by the plaintiff to Oland & Son Limited, Halifax, Nova Scotia, f.o.b. Port Arthur. *Prima facie* in f.o.b. contracts, the general rule appears to be that the risk passes on the shipment of the goods, that is to say, as soon as they are delivered to the carrier. Admittedly there are circumstances which prevent the passage of ownership from the vendor to the purchaser at this point, but I am not able to say from the evidence before me whether any exists in this case or not.

P.S. Atiyah in his book "The Sale of Goods" in Chapter 19, Transfer of Property and Risk in Export Sales says at page 123 under the sub-heading F.O.B. Contracts, (he is of course dealing with the Act in the United Kingdom):

[1] [1932] 1 K.B. 485 at 487.

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In f.o.b. contracts the general rule is that the risk passes on shipment of the goods, that is to say, as soon as they are over the ship's rail. Although the risk usually passes with the property, the risk may well pass before the property in f.o.b. contracts. Thus if the goods are unascertained, and are shipped together with other consignments no property can pass until the goods are specifically appropriated to the particular contract, but the risk passes nonetheless on shipment. Moreover, even when the goods are specifically appropriated to the contract the property may not pass because there is a contrary intention within the meaning of Section 18, or because the appropriation is not unconditional. Thus if the seller reserves the right of disposal by taking the bill of lading in his own name Sect. 19(1) and (2) come into operation to delay the passing of the property. Sect. 19(1) has already been set out above. Sect. 19(2) provides—

> "Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is prima facie deemed to reserve the right of disposal."

In such a case the property does not pass until the bill of lading is transferred to the buyer.

Further he says:

> Despite the fact that the Court may easily be driven to a contrary conclusion it may be said that in f.o.b. contracts the general rule is that property and risk pass together on the shipment of the goods.

In this case as I have already indicated, the bill of lading was taken by Canada Malting Co. Limited as agent and forwarder for account and at the risk of whom it may concern, on board the vessel S.S. *Tynemouth* and the stipulation was that the property herein described was to be delivered as agreed herein in like order and condition to the order of Oland & Son Limited, or their assigns at Halifax, Nova Scotia.

I think it may fairly be said that this bill of lading would indicate that the present plaintiff took it acting as agent for Oland & Son Limited the purchaser of the malt. It therefore raises the question as to who the plaintiff in this action should be. The present plaintiff made the contract with the defendant ship and in that respect reference may be made to the opinion of Lord Simonds in the House of Lords in *Scruttons Ltd. v. Midland Silicones Ltd.*[1] The appellants were Scruttons Ltd. and Midland Silicones Ltd. were the respondents. At page 467 Viscount Simonds, after noting that it was argued that the carrier had purported to contract for the benefit of the stevedores and it was argued that if they had done so, the stevedores could enforce the contract Lord Simonds observed:

[1] [1962] A.C. 446.

Learned counsel for the respondents met it, as they had successfully done in the courts below, by asserting a principle which is, I suppose, as well established as any in our law, a "fundamental" principle, as Lord Haldane called it in *Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd.*, [1915] A.C. 847, 853; 31 T.L.R. 399, H.L. an "elementary" principle, as it has been called times without number, that only a person who is a party to a contract can sue upon it. "Our law", said Lord Haldane, "knows nothing of a jus quaesitum tertio arising by way of contract". Learned counsel for the respondents claimed that this was the orthodox view and asked your Lordships to reject any proposition that impinged upon it. To that invitation I readily respond. For to me heterodoxy, or, as some might say, heresy, is not the more attractive because it is dignified by the name of reform. Nor will I easily be led by an undiscerning zeal for some abstract kind of justice to ignore our first duty, which is to administer justice according to law, the law which is established for us by Act of Parliament or the binding authority of precedent. The law is developed by the application of old principles to new circumstances. Therein lies its genius. Its reform by the abrogation of those principles is the task not of the courts of law but of Parliament. Therefore I reject the argument for the appellants under this head and invite your Lordships to say that certain statements which appear to support it in recent cases such as *Smith and Snipes Hall Farm Ltd. v. River Douglas Catchment Board,* [1949] 2 K.B. 500; 65 T.L.R. 628; [1949] 2 All E.R. 179 C.A. and *White v. John Warwick & Co. Ltd.* (1953) 1 W.L.R. 1285; [1953] 2 All E.R. 1021, C.A. must be rejected. If the principle of jus quaesitum tertio is to be introduced into our law it must be done by Parliament after a due consideration of its merits and demerits. I should not be prepared to give it my support without a greater knowledge than I at present possess of its operation in other systems of law.

Dealing with the problem before me I venture to quote a dissenting judgment of my brother MacKay in 1962 in the case of *Board of Commissioners of Police of Corporation of Township of London v. Western Freight Lines Ltd. and Ulch*[1]. While in this case MacKay J.A. was the dissentient judge the case on which he relied has I think some bearing on the matters before me and I quote his judgment and the long quotation from the case of *Robinson v. Unicos* beginning at page 953.

As was pointed out in the case of *Robinson et al. v. Unicos Property Corp. Ltd.* [1962] 2 All E.R. 24, the rule that amendments will not be permitted if a statute of limitations has intervened, is not a rule applying generally to all amendments. At pp. 25-6 of the Robinson case Holroyd Pearce, L.J. said:

". . . the defendant relies on the well-known words of Lord Esher, M.R. in *Weldon v. Neal* (1887) 19 Q.B.D. 394 at p. 395, where he said:

> 'We must act on the settled rules of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments. If an amendment were allotted setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be

[1] [1962] O.R. 948.

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barred by the Statute of Limitations, it would be allowing the plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant, a proceeding which, as a general rule, would be, in my opinion, improper and unjust. Under very peculiar circumstances the court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so.'

Those words were used in a case where the plaintiff had brought a slander action, had been non-suited, had then obtained from the Court of Appeal an order for a new trial, and then sought to amend by setting up false imprisonment, assault and other causes of action. It was, therefore, a clear case where the plaintiff was trying to set up not only a new cause of action but several new causes of action. Counsel for the defendant then referred us to *Cook v. Gill*, (1873), L.R. 8 C.P. 107 at p. 116, where Brett J. said:

> "Cause of action" has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed,—every fact which the defendant would have a right to traverse.'

He contends that it was in that sense that Lord Esher M.R. said that no amendment could be allowed setting up a cause of action. If that argument is right, it follows that no material fact could ever be amended or added after the period of limitation had expired. Such a narrow meaning was certainly not put on Lord Esher's words in such cases as *Collins v. Hertfordshire County Council*, [1947] 1 All E.R. 633; [1947] K.B. 598 and *Dornan v. J. W. Ellis & Co. Ltd.*, [1962] 1 All E.R. 303.

In my view the dictum of Lord Esher was not intended to lay down a rule that no material averment could ever be amended or added to after the period of limitation had expired. When he said 'a cause of action', he was, I think, referring to what is popularly known as a cause of action, namely a claim made on a certain basis. By 'a new cause of action', he meant a new claim made on a new basis."

In the case at Bar I am only precluded from making the amendment if by doing so I deprive the defendants of some legal defence which they now have, or if I permit the plaintiff to set up, by the addition of Oland & Son Limited, a new cause of action. Examining this matter I am not convinced that if the amendment is made as asked either of these things occur.

To begin with the bill of lading was entered into by the present plaintiff as an agent and the only person for whom it could be an agent in the circumstances of this case is Oland & Son Limited to whom the goods were being consigned. That is quite clear from the material before me.

From a very short time after the cargo had been delivered in a damaged condition at Halifax the defendants knew that a claim was being asserted against them in connection with this shipment of malt and the addition of Oland & Son Limited as plaintiff is merely to add and bring before the court the real principal in the case, for

whom the present plaintiff acted as agent. In doing so it was the contracting party and I think it advisable that it should continue in the case because of that. In my opinion I am not depriving the defendants of any real defence they have to this action, nor am I setting up any new cause of action. It is precisely the same cause of action which has existed since the writ was issued.

In doing all this I am also conscious of the fact that the Limitations Section with which I am dealing is one contained in the Hague Rules and in that respect I would also like to again refer to the judgment of Viscount Simonds in the case of *Scruttons Ltd. and Midland Silicones Ltd.* to which I have already referred. At page 471 he said:

> In the consideration of this case I have not yet mentioned a matter of real importance. It is not surprising that the questions in issue in this case should have arisen in other jurisdictions where the common law is administered, and where the Hague Rules have been embodied in the municipal law. It is (to put it no higher) very desirable that the same conclusions should be reached in whatever jurisdiction the question arises. It would be deplorable if the nations should, after protracted negotiations, reach agreement, as in the matter of the Hague Rules and that their several courts should then disagree as to the meaning of what they appeared to agree upon: see *Riverstone Meat Co. Pty. Ltd. v. Lancashire Shipping Co. Ltd.* [1961] A.C. 807; [1961] 2 W.L.R. 278; [1961] 1 All E.R. 495, H.L. and cases there cited. It is therefore gratifying to find that the Supreme Court of the United States in the recent case of *Robert C. Herd & Co. Inc. v. Krawill Machinery Corporation,* (1959) 359 U.S. 297; [1959] 1 Lloyd's Rep. 305, not only unanimously adopted the meaning of the word "carrier" in the relevant Act, which I invite your Lordships to adopt, but also expressed the view that the Elder, Dempster decision [1924] A.C. 522 did not decide what is claimed for it by the appellants.

In respect of the matters before me I was referred to the decision of *Firestone Plantations Company v. United States of America*[1]. This is a judgment of the District Judge, Wilkin and at page 747 his judgment, which is quite brief, may be set out in full. It is as follows:

> The motion of The Firestone Tire & Rubber Company for leave to intervene is sustained. Libellant had a right to file libel; consignor may sue for benefit of consignee. *The City of Brunswick (D. Mass)* (1934) A.M.C. 552, 6 F. Supp. 597; *Aunt Jemina Mills Co. vs. Belge (SDNY),* (1928) A.M.C. 1635, 38 F. (2d) 398; *Northern Commercial Co. vs. Lindblom* (9CCA), 162 Fed. 250. Consignee's interest entitles it to participate. The running of the statute of limitations was stopped by the filing of the libel and therefore did not run against the motion or petition to intervene. *Holmes vs. City of New York* (2CCA), 1929 A.M.C. 216, 30 F. (2d) 366; *U.S. vs. Middleton* (E.D.S.C.), 1923 A.M.C. 148, 649; (4CCA), 1925 A.M.C. 85 3 F. (2d) 384.

[1] (1945) A.M.C. 746.

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Certain of the authorities relied on would seem to indicate principles of law that are somewhat at variance with those obtaining in this jurisdiction, but in view of Lord Simonds' remarks it is satisfactory that one has been able to interpret the limitations section of the Hague Rules in essentially the same manner.

There will therefore be an order *nunc pro tunc* as of the issue of the writ permitting Oland & Son Limited to be added as a party plaintiff. If the plaintiffs should see fit to amend their statement of claim then the defendants should have the usual time under the rules to amend their statement of defence. The plaintiffs should have the usual time to make Reply. As the new plaintiff is out of the jurisdiction it may be that some question of security for costs will arise and if so, such matter may be referred to The Registrar. This is in my opinion an order that should be made on terms. They are, that the new plaintiff should agree that at the trial they will not be entitled to any further costs against the defendants than the present plaintiff would have been entitled to if they had gone to trial and had succeeded in the action they have brought. In other words, the costs are not to be increased by reason of the adding of the new plaintiff. There will be one set of costs for both plaintiffs. Costs of this motion to defendant in the cause.