BRITISH COLUMBIA ADMIRALTY DISTRICT

1964
Mar. 23-26
Aug. 24

BETWEEN:

THE BRITISH COLUMBIA SUGAR REFINING COMPANY LIMITED PLAINTIFF;

AND

THE SHIP *THOR I* ..... DEFENDANT.

Shipping—Damage to cargo of sugar by salt water—Leakage at valve in sanitary line—Water Carriage of Goods Act, R.S.C. 1952, c. 291, Art. III, R. 1; Art. IV, R. 1; Art. IV, R. 2(a)—The Hague Rules—Whether ship seaworthy—Onus on carrier to exercise due diligence to make ship seaworthy—Whether onus established—Whether defect latent—Want of care of vessel distinguished from want of care of cargo—Liability of carrier.

A cargo of sugar on the ship *Thor I* was damaged by salt water in the course of a voyage from the Fiji Islands to Vancouver in January 1962. The water entered the hold through a leak near a valve in a sanitary line which discharged from the hold into the sea below the level of the cargo. The leak was discovered when the ship was some days at sea and although the pumps were operated continuously the leakage increased to the point that the ship became unstable shortly before putting into San Pedro, California. On inspection the line was found to be badly corroded near the valve. The valves in the line had last been inspected by the carrier in 1960 when the ship was in dry dock but there was no evidence as to what had been done with them or as to the condition of the line at that time.

Held: The owners of the ship were liable for the damage to the sugar.

2. The sanitary line was corroded at the flange to an extent which rendered the vessel unseaworthy at the inception of the voyage, and the damage to the sugar was the result of that unseaworthiness. [*Gilroy, Sons & Co. v. Price & Co.* [1893] A.C. 56, per Herschell, L.C. at p. 63 applied.]

3. The evidence as to the inspection of the valves in 1960 was not sufficient to discharge the onus on the carrier of proving the exercise of due diligence to make the ship seaworthy, as required by Art. III, Rule 1, and Art. IV, Rule 1, of the *Water Carriage of Goods Act*, R S C. 1952, c. 291 (which is in the same terms as the Fiji *Carriage of Goods Ordinance, 1926*). The defect in the pipe was not latent, i e. one which could not be discovered by due diligence. [*Riverstone Meat Co. Property Ltd. v. Lancashire Shipping Co. Ltd.* [1961] A.C. 807, referred to.]

4. The damage to the cargo was caused by want of care of the cargo and not by want of care of the vessel indirectly affecting the cargo, and consequently the carrier was not relieved of liability by Art. IV, Rule 2(a) of the *Water Carriage of Goods Act*. [*Gosse Millerd Ltd. v. Canadian Government Merchant Marine*, [1928] 1 K.B. 717, per Greer L.J.; [1929] A.C. 223, per Lord Sumner at p. 236, applied.]

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ACTION for damages for damage to cargo.

The action was tried by the Honourable Mr. Justice Norris, District Judge in Admiralty for the British Columbia Admiralty District, at Vancouver.

J. I. Bird, Q.C. for plaintiff.

V. R. Hill for defendant.

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

NORRIS D.J.A. now (August 24, 1964) delivered the following judgment:

This is an action by the plaintiff against the ship *Thor I* and the owners thereof in respect of a claim for damage to a cargo of raw sugar by salt water which entered Nos. 2 and 3 holds of the ship, being in effect a common hold without partition, during the course of a voyage from Fiji to Vancouver, B.C. Part of the cargo of sugar was loaded in No. 1 hold but it was not damaged and there is no claim in respect of this part of the cargo. The facts are as follows:

Under Bill of Lading dated December 30, 1961, there was shipped by Colonial Sugar Refining Co. Ltd. from Labasa, Fiji Islands to be delivered at Vancouver to Czarnikow (Canada) Ltd., of Montreal or their assigns in terms of a Charter-Party dated November 2nd, 1961 between that Company and the owners of the Ship *Thor I*, Dahls Hvalfangerselskap A/S of Sandefjord, Norway, 3,647.81 tons of raw sugar (in good order and condition). The plaintiff is the assignee of the Bill of Lading and at all material times was the owner of the sugar. Nothing in this action turns on the terms of the Bill of Lading or of the Charter-Party save that the Bill of Lading was expressed to be subject to the *Fiji Sea Carriage of Goods Ordinance, 1926* and amendments. It was agreed between counsel that the provisions of that Ordinance and in particular the rules thereunder (commonly known as the Hague Rules) were for all practical purposes the same as the provisions of the *Water Carriage of Goods Act* and Rules thereunder. Czarnikow (Canada) Limited were brokers for the plaintiff and the bill of lading was endorsed in blank and delivered to the plaintiff.

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After leaving Labasa on December 30, 1961, the vessel went to Suva on the same day and left on that day. The vessel called in at Pago Pago on December 31 and sailed from there on January 3, 1962 for Los Angeles, California, enroute to Vancouver, B.C.

On January 14, 1962, it was discovered that the ship was leaking. The sugar in the common hold Nos. 2 and 3 was several feet deep in the hold. On January 12, 1962 on soundings it had been found that there were 15 centimetres of water in the starboard bilge of the common hold. On the afternoon of the 14th the water had increased to 85 centimetres, there being at this time 100 centimetres of water in the port bilge of the common hold. The bilge pump was started at six o'clock and the engineer discovered that there was sugar in the water, indicating to the Acting Chief Officer, Ignir Larsen, that the bilge had overflowed into the cargo of sugar. The bilge pump was kept going continuously. On the 15th when the soundings were again taken it was found that the common hold, starboard, contained 190 centimetres of water; on the port side the soundings showed 95 centimetres. A second sounding on the same day showed 230 centimetres of water starboard and 100 centimetres on the port side. The increase in the level of the water existed in spite of the fact that the bilge pumps were operating. The Master noticed that there was a slight list of the vessel to starboard and the vessel was unstable on January 15th and 16th. On the 15th, the inflow of water was so serious that the cargo in the tween decks was shifted and the First Officer Larsen went into the lower hold with the carpenter and one other seaman. It was found that the hold was awash, sugar having dissolved in the water. Another pump was brought to the tween decks and rigged up, but the pumps did not operate satisfactorily owing to the fact that the sugar got into the motor.

On the starboard side of the ship there was a sanitary overboard discharge line which took the waste from the lavatories and the wash basins down and out into the sea. This pipe went through the tween decks and down through the main deck into the lower hold. The pipe went through the side of the ship about ten to twelve feet above the bottom of the hold and about the middle of the hold and discharged into the sea below the level of the cargo of sugar.

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It was protected by wooden battens. In its downward reach the pipe was close to the ribs of the ship and there was an elbow at the place where the pipe was carried to the skin of the ship. On the pipe at the outside of the ship there was a gate valve which was opened and closed from the main deck, and close to the elbow the pipe was cut and flanged on both sides to receive what was stated in the evidence to be a clapper valve. Although there was some suggestion that this clapper valve was not a true non-return valve, but was merely there to prevent the "swish of water in the pipe", to all intents and purposes it performed the function of a non-return valve. Because of the list and as some of the sugar on the port side was dry, the First Officer was suspicious that the leak was in the sanitary line and the gate valve was therefore closed. Because of the position of the cargo of sugar, the lower part of the sanitary line could not be inspected. Several times during the 15th the First Officer went down to the hold. The Master of the ship stated in evidence that with water in the area of the size of the common hold, the vessel "might go right over." The vessel arrived at Los Angeles, California, on January 16, and on January 17 at San Pedro the water on top of the sugar was pumped out. As a result of the sinking of the sugar on the water being pumped out, the crew were able to get to the sanitary line and found that there was a hole in the sanitary line at a flange adjoining the non-return valve. The pipe was removed and replaced and the vessel left San Pedro on January 19 and San Francisco on the 21st, arriving at Vancouver on the 24th.

There was evidence that the valves had been taken out in 1960 while the ship was in dry dock, but there was no evidence as to what was done with them or as to the condition of the pipe at that time. The gauge of the pipe was $\frac{3}{8}$ of an inch and according to Captain Jeans, a Marine Surveyor who inspected the vessel at San Pedro on January 17, where the hole was, the metal was knife edge thin. The Court had the opportunity of inspecting the section of pipe in which the hole appeared, it being Exhibit 12 at the trial. A survey report by a classification surveyor for the Norske Veritas, the classification standards of which are similar to those of Lloyds, was also filed as Exhibit 15. He inspected

the vessel on January 17 and 18. His report reads in part as follows:

> Water in Nos. 2 & 3 (common) hold due to a leak in the starboard soil pipe at the shell connection at approximate mid-length of No. 3 lower hold.
>
> *Found*—Soil Pipe wasted and holed at flanged connection to overboard flap valve. Flap valve leaking and adjoining shut-off gate valve controlled from main deck also leaking.

In my opinion from the whole of the evidence, assisted by an inspection of the exhibits, including the section of the pipe in which the hole appears, the cause of the damage was the corrosion of the sanitary pipe at the flange. It is clear that the pipe was badly corroded and that this corrosion existed to such an extent as to render the vessel unseaworthy at the inception of the voyage. Under these circumstances, I find that the vessel was unseaworthy at that time and that the damage was the result of such unseaworthiness.

The First Officer on his examination *de bene esse* gave evidence as follows:

> Q. How much water was there in the port and starboard bilges abreast of No. 3 hold on January 14th when you received this report?
>
> A. There was ninety-five centimetres on the port side and one hundred centimetres on the starboard side.
>
> Q. At that time were you aware that there must have been sea water entering the ship through some hole in either the ship's side or the pipes?
>
> A. Yes.
>
> Q. Is that something that you would expect if the vessel had been in sound condition when she left Labasa?
>
> A. No.

The condition of the pipe itself supports this evidence. As to the standard of seaworthiness I refer to *Gilroy, Sons & Co. v. Price & Co.*,[1] Lord Herschell, L.C. at p. 63:

> Now, my Lords, I apprehend that those findings amount to a finding of unseaworthiness at the time when this vessel started on her voyage. Seaworthiness is thus defined by Lord Cairns, in the case to which I have already called attention:—"That the ship should be in a condition to encounter whatever perils of the sea a ship of that kind, and laden in that way, may be fairly expected to encounter in crossing the Atlantic," or in performing whatever is the voyage to be performed. Now, my Lords, how is it possible to say that in that sense this vessel was seaworthy? Laden in that way, and being a ship such as she was, she had a pipe uncased in such a position and of such a character that if the ship rolled the water must be let in. That is a short statement of the facts; and

[1] [1893] A.C. 56.

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really to say that a vessel of which that, under the circumstances, is a proper description is seaworthy would be, as it seems to me, to reduce the definition of seaworthiness to an absurdity. Therefore, my Lords, it appears to me that the findings amount to a finding that the vessel was not seaworthy.

The valves were not examined after 1960. The evidence of inspection at that time is not satisfactory and in any event, that inspection, such as it was, was not sufficient to discharge the onus on the carrier of exercising due diligence under all circumstances.

Rennie, a Lloyds' surveyor, whose evidence I accept, stated in answer to a question by the Court referring to the date when the valves were taken out:

Q. Now, bearing those assumptions in mind, first of all what have you to say as to whether or not these, this sanitary discharge line would be a vulnerable spot in a ship?

A. I consider it very vulnerable, especially put in a long hold as described in this, and No. 2 and 3 holds around a sanitary discharge below the water line.

Q And why do you say it is vulnerable?

A. Because the ship's side valve—

THE COURT: Q. Because what?

A. The ship's side valve, the gate valve, my lord, is below the water line, and the pipe discharges waste from bathrooms, toilets, pantry and other items, . . .

.....

Q Yes, it is said that the clapper disc in the non-return valve on this vessel had five ⅜ inch holes in it when it was inspected after the damage was found. What have you to say as to whether a valve in that condition is in fit condition so far as seaworthiness is concerned?

A. In my opinion the valve is not serving the functional purpose for which it is designed.

THE COURT: That isn't the question, I am sorry, Mr. Rennie.

MR. BIRD: Would you just read the question back.

THE REPORTER: "Q. It is said that the clapper disc in the non-return valve on this vessel had five ⅜ inch holes in it when it was inspected after the damage was found. What have you to say as to whether a valve in that condition is in fit condition so far as seaworthiness is concerned?"

A I would add the valve was inefficient.

MR. BIRD: Q. Inefficient?

A. Is that sufficient, my lord?

THE COURT: Q. No, that isn't. Does it go to seaworthiness as counsel has asked you?

A. In that condition it reduces the efficiency of the valve, and so conduces, in a measure, a lack of seaworthiness.

Q. Conducing a lack of seaworthiness?

A. In a measure.

.....

Q. Now, remember the master of the "THOR I" said that it was the engineer's job to inspect, look after these valves. Assuming that is correct, would you, being an engineer on the vessel, consider it your duty to do anything about these valves before loading?

A. I consider it prudent, yes.

Q. Would you, as a matter of routine?

A I think it should be done.

Q And would you do it?

A. Yes.

Q And did you ever do it yourself?

A. No, I never. When I was at sea I had no such similar case with valves in a hold.

Q. Apart from similar cases, you see Mr. Bird has put it up that this ship was loading, you see, and he doesn't suggest that you wouldn't know whether it was leaking or not at this stage; would you yet, being the engineer, and as far as you knew everything was running along as usual, would you go down and look at that valve and do something about it before loading, before the ship went off to sea?

A. I think so, yes.

Q. As a matter of routine you would inspect all valves?

A. Yes, my lord.

Q. And would inspect that valve?

A. Yes, my lord.

Q. Assuming there is no indication there was anything wrong with it?

A I would feel it was my duty to open it and close it again to satisfy myself that it was satisfactory to operate before it was buried in cargo.

Q I see. What about the other valve?

A. The other valve is a union valve, and it wouldn't be opened out except at periodic surveys.

.....

Q. Now, Mr. Rennie, I was directing your attention to this pipe, and you observed it some months ago, I believe, and we have heard about the heavy scale in it. Now, we also heard from the Master with respect to the fact that at Moore Dry Dock both valves were completely removed. Now, as a surveyor, a classification surveyor, with these valves removed, would you consider it, or what would you have to say about any inspection of the pipe itself?

A. I would consider that an excellent opportunity to examine the interior surface of the—

THE COURT: It doesn't need a marine surveyor to tell us that, Mr. Bird. "It would be an excellent opportunity". We can all see that. That is not the question.

Q. Having yourself taken this out, and you being the engineer in charge of all such matters, would you consider it your duty to inspect this sanitary line?

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A. Yes, my lord, an excellent opportunity.

Q. And would you consider it part of your duty to do so, and would you do it?

A. Yes, my lord.

In my opinion, the judgments of the House of Lords in *Riverstone Meat Co. Pty. Ltd. and Lancashire Shipping Co. Ltd.*[1] (the *Muncaster Castle* case) are applicable to the case at bar. The *Fiji Sea Carriage of Goods Order* of 1926 and the rules thereunder apply. These are similar to the rules under the Canadian statute, the *Water Carriage of Goods Act* and similar to the rules considered in the *Muncaster Castle* case, *supra*. The rules Article III, Rule 1 provide:

1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to,

(*a*) make the ship seaworthy;

(*b*) properly man, equip, and supply the ship;

(*c*) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

Article IV, Rule 1 reads as follows:

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph I of Article III.

Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.

In my opinion the vessel being unseaworthy, the carrier did not exercise due diligence "to make the ship seaworthy" and the defendant has not discharged the onus resting on him to prove that such diligence was exercised, in the circumstances of this case, within the requirements of "seaworthiness" referred to by Lord Herschell, L.C.

In the *Muncaster Castle* case Lord Simonds stated at page 844:

. . . no other solution is possible than to say that the shipowner's obligation of due diligence demands due diligence in the work of repair by whomsoever it may be done.

At page 866 Lord Radcliffe quoted with approval from the 13th edition of Scrutton on Charterparties as follows:

[1] [1961] A.C. 807.

. . . The 13th edition of that work, published in 1931 and edited jointly by Mr. (later Lord) Porter and Mr. McNair (now McNair J.) makes the following comment on that article (p. 513, note (z)): "In appearance the undertaking to use due diligence to make the ship seaworthy is less onerous than the old common law undertaking that the ship is in fact seaworthy. In reality there is no great gain to the shipowner by the substitution. For . . . the relief to the shipowner by the substitution will occur only in cases where the unseaworthiness is due to some cause which the due diligence of all his servants and agents could not discover, e.g., in the case of latent defects not discoverable by due diligence."

There is no case, on the evidence here, of latent defect within the terms above quoted by Lord Radcliffe.

Lord Sterndale, M.R. in *The Dimitrios N. Rallias*[1] quoting Carver on Merchant Shipping, page 366:

It was suggested to us that the definition contained in a work of authority, Carver, gathered from American decisions, is a better statement of what is meant by latent defect. That definition is:—

A defect which could not be discovered by a person of competent skill and using ordinary care.

In this case I do not think it necessary to say whether that is the true and precise definition of latent defect which would meet every case. But I am prepared to say this, that a defect which does not comply at any rate with these words could not be a latent defect; and I think it is important in bearing in mind the effect of these words, . . .

On the evidence, I have no doubt that there were no proper inspections for the security of the cargo and that the weakness in the pipe could have been discovered had the simple precautions of ordinary care indicated by Rennie been taken. He gave the following evidence in answer to questions by the Court:

THE COURT: Q. I take it a pipe is like a human being; when he is born he starts to grow old,—

A. Yes, my lord.

Q. —and I suppose from the time that pipe was in there would be some evidence of some corrosion?

A. Yes, my lord. I would take a hammer to the pipe and see if I could detect any weak spots if the corrosion was sufficiently pronounced, and probably as a matter of routine.

MR. BIRD:

Q. And how could you tell? You say you would use a hammer. What can you tell from that?

A. Well, even the parts in any steel structure have a different tone, or note, than a thick and solid part.

MR. BIRD: Yes.

THE COURT: Q. I am trying to reduce these matters to homely terms. I suppose it's like hammering a wall to see where the studding is to hang a picture?

A. Exactly the same thing, my lord.

[1] (1922-23) 13 Ll.L.R. 363.

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MR. BIRD:

Q. So if there were any weaknesses there you could detect it by the hammer test?

A. I believe so, my lord.

The evidence of Larsen, the Chief Officer, taken *de bene esse* makes it clear that no routine or proper inspections of the pipe line were made.

See also *Canadian Transport Co. v. Hunt, Leuchars, Hepburn Ltd.*[1] Sidney Smith D.J.A. at pp. 656-7.

The duty of the carrier as to inspections is well set out by Lord Radcliffe in the *Muncaster Castle* case at page 867:

> It is plain to me that this conclusion turns on the consideration that the causative carelessness took place at a time before the carrier's obligation under article III (1) had attached and in circumstances, therefore, when the builders and their men could not be described as agents for the carrier "before and at the beginning of the voyage to . . . make the ship seaworthy." This is a tenable position for those who engage themselves upon the work of bringing the ship into existence. The carrier's responsibility for the work itself does not begin until the ship comes into his orbit, and it begins then as a responsibility to make sure by careful and skilled inspection that what he is taking into his service is in fit condition for the purpose and, if there is anything lacking that is fairly discoverable, to put it right. This is recognized in the judgment. But if the bad work that has been done is "concealed" 118 Ibid 462, and so cannot be detected by any reasonable care, then the lack of diligence to which unseaworthiness is due is not to be attributed to the carrier.

Some evidence was given as to whether or not the pipe had been galvanized in accordance with the original classification rules, but in view of the opinion I have of the matter that due diligence was not exercised by the carrier this question is not of importance.

I do not think that the damage was caused by any error of ship builders but because of the lack of due diligence on the part of the owners. The evidence showed that there was little or no inspection and that whatever inspection was made falls short of the exercise of diligence in the circumstances.

It was argued by counsel for the defendant that the errors were errors in handling, in management, and not errors connected with the cargo. It is my opinion that the errors are not errors which fall within the words "management of the vessel" and indicate a direct want of care in respect of the cargo. As the sanitary line ran through the hold used by

[1] [1947] 2 D.L.R. 647.

the carrier to stow the cargo of sugar, a commodity particularly susceptible to damage from leakage, the due diligence which should have been exercised regarding the pipe line was diligence required with respect to cargo. I find little difference between the lack of diligence which existed in the *Muncaster Castle* case and the lack of diligence existing in the case at bar, and with respect, I am satisfied that what was involved here was a "want of care of the cargo" and not a "want of care of the vessel indirectly affecting the cargo", to use the words of Lord Hailsham L.C. in *Gosse Millerd, Ld. v. Canadian Government Merchant Marine*[1].

With respect I think also that the words of Greer L. J. in the *Gosse Millerd*[2] case in the Court of Appeal as quoted by Smith D. J. A. in *Kalamazoo Paper Company et al v. C.P.R. Co. et al*[3] are in point:

> Further, I think it is incumbent on the Court not to attribute to Art. IV, r. 2(a), a meaning that will largely nullify the effect of Art III, r. 2, unless they are compelled to do so by clear words. The words "act, neglect or default in the management or navigation of the ship," if they are interpreted in their widest sense, would cover any act done on board the ship which relates to the care of the cargo, and in practice such an interpretation, if it did not completely nullify the provisions of Art. III, r. 2, would certainly take the heart out of those provisions, and in practice reduce to very small dimensions the obligation to "carefully handle, carry, keep, and care for the cargo," which is imposed on shipowners by the last-mentioned rule In my judgment, a reasonable construction of the Rules requires that a narrower interpretation should be put on the excepting provisions of Art. IV, r. 2(a). If the use of any part of the ship's appliances that is negligent only because it is likely to cause damage to the cargo is within the protection of Art. IV, r. 2(a), there is hardly anything that can happen to the cargo through the negligence of the owner's servants that the owner would not in actual practice be released from. To hold that this is the effect of Art. IV, r. 2(a), would reduce the primary obligation to "carefully carry and care for the cargo during the voyage" to a negligible quantity. In my judgment, the reasonable interpretation to put on the Articles is that there is a paramount duty imposed to safely carry and take care of the cargo, and that the performance of this duty is only excused if the damage to the cargo is the indirect result of an act, or neglect, which can be described as either (1) negligence in caring for the safety of the ship; (2) failure to take care to prevent damage to the ship, or some part of the ship; or (3) failure in the management of some operation connected with the movement or stability of the ship, or otherwise for ship's purposes.

Lord Sumner in concurring with the judgment of Greer L. J. who had dissented in the Court below, but who was upheld

[1] [1929] A C. 223 at 233. [2] [1928] 1 K B. 717.
[3] [1949] Ex. C.R. 287 at 297.

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in the House of Lords said in *Gosse Millerd, Ld. v. Canadian Government Merchant Marine, supra* at p. 236 of the report:

> My Lords, for the following reasons I am unable to accept either of their views. I concur in the judgment of Greer L.J. The intention of this legislation in dealing with the liability of a ship owner as a carrier of goods by sea undoubtedly was to replace a conventional contract, in which it was constantly attempted, often with much success, to relieve the carrier from every kind of liability, by a legislative bargain, under which he should be permitted to limit his obligation to take good care of the cargo by an exception, among others, relating to navigation and management of the ship. Obviously his position was to be one of restricted exemption. If management of the ship includes any part of the ship or any operation with regard to the ship as a whole, which is carried out for ship's purposes and not merely in relation to cargo, I think that the shipowner's position would be certainly no less favourable than it was before under voluntary bills of lading and probably more so; for on this construction the obligation of Art. III., r. 2, to take care of the cargo is practically eviscerated and its business efficacy is frustrated. In every set of circumstances, of common occurrence at any rate, the shipowner would be relieved. Considering the provisions of the Act of 1924 and the circumstances in which it was passed, such an interpretation is admissible only if the words used are clear to that effect, and to my mind they are not.

In my opinion the judgment of Greer L. J. and the concurring judgment of Lord Sumner are in the circumstances of this case, conclusive against the submission of the defendant that the negligence of the carrier was an error in management of the vessel, only indirectly affecting the cargo.

There will be judgment for the plaintiff as claimed and a reference to the Registrar to determine the quantum of damages.