ONTARIO ADMIRALTY DISTRICT

Toronto 1968 Apr. 2-4

Ottawa Apr. 17

BETWEEN:

CLUB COFFEE COMPANY LIMITED ....PLAINTIFF;

AND

MOORE-McCORMACK LINES, INC., MOORE-McCORMACK LINES (CANADA) LIMITED and EASTERN CANADA STEVEDORING (1963) LTD. ..... DEFENDANTS.

Shipping—Damages—Shipment of coffee—Bill of lading giving U.S. port as destination—Substitution of bill of lading with Montreal as destination while ship at sea—Portion of cargo not delivered—Customs duty paid by consignee—Whether recoverable as damages—U.S. Carriage of Goods by Sea Act—Inapplicability of—Clause in bill of lading re valuation of goods lost—Effect of on computation of damages.

The *Mormacisle* carried 500 bags of coffee from Rio de Janeiro to Montreal, the coffee being originally covered by a bill of lading giving its destination as New York or Boston at owner's option, but before the ship reached a United States port that bill of lading was surrendered to the shipowner at New York who issued in its place two bills of lading, each for 250 bags of coffee, with Montreal as destination The *Mormacisle* touched at New York and Boston before arriving with the coffee at Montreal where plaintiff, who held one of the bills of lading, paid customs duty on 250 bags of coffee. Plaintiff did not receive delivery of 92 bags and 80 pounds of coffee and sued the shipowner and the ship's agent for damages A clause in plaintiff's bill of lading declared that in calculating claims the value of the goods should be invoice price plus freight and insurance if paid and that it should be construed according to the law of the United States Under the Canadian *Customs Act* duty was payable on the coffee when the *Mormacisle* entered Canada and defendants knew that no refund of duty for the undelivered coffee would be made unless the shipowner produced a satisfactory explanation, which it did not do.

Held, the customs duty paid on the lost coffee was an element of plaintiff's damages resulting from the non-delivery of the coffee

1. The damages recoverable for a shipowner's failure to deliver goods are not restricted to the value of the goods but include customs duty which the owner of the goods has paid or become liable to pay thereon. *Town of Weston v The Steamer Riverton* [1924] Ex. C.R 65, *S S Ardennes (Cargo Owners) v. S.S. Ardennes (Owners)* [1951] 1 K B 55, distinguished.

2. While s 3(8) of the United States *Carriage of Goods by Sea Act* would if it applied render void the clause in the bill of lading as to valuation of goods, that statute applies only to contracts of carriage to or from United States ports and so did not apply here following the substitution of bills of lading; but in any event that clause in the bill of lading merely provides for the calculation of the value of

1968

CLUB COFFEE CO. LTD. v. MOORE-MCCORMACK LINES, INC. et al

goods as an element in the calculation of damages for non-delivery, and the right to recover the customs duty paid thereon as another element of such damages is not affected thereby.

ACTION for damages.

D. L. D. Beard for plaintiff.

E. M. Lane and *Norman M. Chorney* for defendants.

THURLOW J.:—In this action the plaintiff claims damages resulting from the failure of the defendants to deliver part of a shipment of coffee carried in the first named defendant's ship *Mormacisle* on a voyage from Rio de Janeiro to Montreal. Neither the loss of the coffee nor the right of the plaintiff to recover its value is in dispute, nondelivery of 92 bags and 80 pounds of the coffee included in the shipment being admitted, but issue arises on the claim of the plaintiff that the damages recoverable in respect of the loss include Canadian Customs duty which it paid on the lost coffee. The plaintiff's claim also included items in respect of customs brokerage and expenses of a letter of credit but these were abandoned in the course of the argument.

The defendant Moore-McCormack Lines Inc. is a United States corporation and the defendant Moore-McCormack Lines (Canada) Limited is its Canadian subsidiary and agent in Canada. No issue has been raised as to which of these two defendants, who are herein referred to as the "defendants", is liable to the plaintiff for the loss. The plaintiff's claim as against the third named defendant was abandoned in the reply and the action as against that defendant has been discontinued.

When the *Mormacisle* left Rio de Janeiro the shipment of coffee, consisting of some 500 bags of coffee, was destined for New York or Boston, at the option of its owner, under a contract evidenced by a bill of lading issued by the first named defendant on November 4, 1964. On November 18, 1964, however, when the ship was at sea and had not yet reached any United States port this bill of lading was surrendered by its holder to the first named defendant in New York with a request by letter that the ladings be split in the manner therein mentioned and that the port of discharge be Montreal. The first named defendant thereupon issued at New York two bills of lading each for 250 bags of

coffee showing Rio de Janeiro as the port of loading and Montreal as the port of discharge. The plaintiff is the holder of one of these two bills of lading.

After the issuance of these bills of lading the *Mormacisle* touched at several United States ports including New York and, finally, Boston whence she proceeded directly to Montreal and arrived there on December 7, 1964. The whole of the coffee was thereupon reported by the second named defendant or the master of the ship, or both, to the Canadian customs authorities as being on board and on December 15 the plaintiff, who had previously instructed Smith Transport to bring the coffee from Montreal to Toronto in bond, through its brokers made a customs entry at Toronto for the whole of the coffee showing 132 bags as received and 118 bags to follow and in accordance with what was admitted on discovery to be the practice, paid the duty at 2 cents per pound on the whole 250 bags of coffee. Thereafter on December 29, 1964, 26 bags were received but 92 bags and 80 pounds of the coffee were never delivered.

At some point, either shortly before or shortly after the arrival of the *Mormacisle* in Montreal (the precise date does not appear), the defendants sent to the plaintiff at Toronto an arrival notice which consisted of an invoice for the ocean freight on the 250 bags of coffee referring to them as "in bond", mentioning the name of the ship and the number of the bill of lading and including a notice in the following terms:

> The above mentioned vessel is now in port with goods as described for your account. You are requested to pass Customs entry and take delivery without delay. It is in your interest to do so promptly and thereby avoid Harbour penalty charges assessed.

A further invoice for the ocean freight on the 250 bags of coffee was dated January 14, 1965 and was paid by the plaintiff on January 18, 1965. The shortage of 92 bags had, however, been reported to the defendants on December 28, 1964, in a preliminary report by the third named defendant, a stevedoring company, which had been employed by the defendants to discharge the ship's cargo. The report in question indicated that the 92 bags could not be located after the discharge of the cargo.

By sections 19 to 22 of the *Customs Act* every importer of goods by sea from any place out of Canada is required

1968

CLUB COFFEE CO. LTD. v. MOORE-MCCORMACK LINES, INC. et al

Thurlow J.

within three days after the arrival of the importing vessel to make a customs entry of such goods containing a description of them and of their quantity and value and other details, to deliver, as well, an invoice showing the place and date of their purchase and other details, and, unless the goods are to be warehoused in the manner provided by the Act, to pay down at the time of entry all duties upon all such goods entered inwards. By section 100, for the purpose of levying any duty the importation of any goods, if made by sea, is deemed to have been completed from the time such goods were brought within the limits of Canada and by section 101, the true amount of customs duty payable with respect to any goods imported into Canada, from and after the time when such duties should have been paid or accounted for, constitute a debt due and payable to Her Majesty, jointly and severally from the owner of the goods at the time of their importation and from the importer thereof. By section 111(1), it is provided that no refund of duty is to be allowed because of any alleged inferiority or deficiency of quantity of goods imported and entered and which have passed into the custody of the importer under permit of the collector, or because of the omission in the invoice of any trade discount, or other matter or thing, that might have the effect of reducing the quantity or value of such goods for duty, unless the same has been reported to the collector within 30 days of the date of entry or delivery or landing, and the said goods have been examined by the said collector or by an appraiser or other proper officer and the proper rate or amount or reduction certified by him after such examination. Section 111(2) goes on to provide that all applications for refund of duty in such cases shall be submitted with the evidence and all particulars for the decision of the Minister, who may order payment on finding the evidence sufficient and satisfactory.

It may be added that the defendants were at all material times aware that customs duty at 2 cents per pound was payable on the importation of coffee into Canada and were also aware that no claim by an importer for a refund of duty paid on cargo would be allowed in a case of this kind save on production by the shipowner within 30 days of an

amending declaration stating that the lost goods which had been shown on the ship's report inwards as being on board, were not in fact imported into Canada and a short landing certificate supported by documents establishing either that the goods had never been loaded on the ship or that they had been discharged before the ship reached a Canadian port or had been lost at sea.

The effect of the provisions of the *Customs Act* to which I have referred appears to me to be that if the 92 bags of coffee were brought into Canada the plaintiff became liable for customs duty in respect of them whether it ultimately received them or not. However, even though they were reported by the Master of the ship and entered by the plaintiff as having been imported the plaintiff would not have been liable for duty in respect of them if they were not actually imported into Canada and by following the procedure prescribed by section 111 would have been entitled to a refund of the duty paid on them on satisfying the Minister that the missing goods had not in fact been imported into Canada. Short of satisfying the Minister on that point, however, it does not appear to me that any refund would have been obtainable. At the same time it is also apparent that the plaintiff, whose goods were not delivered, could have no means of satisfying the Minister of the material fact unless the defendants could provide evidence of it. This, however, they did not do and I think the inference is plain that they did not do so because they were not able to substantiate the fact. With this must I think be considered the fact that Mr. Jewell, in the course of his examination for discovery given on behalf of both defendants stated that the ship went directly from Boston to Montreal, and that "to our knowledge" the coffee was still on board when the ship left Boston.

In most cases of this kind the measure of the damages recoverable for failure to deliver goods is the value of the goods at their destination at the time they should have been delivered pursuant to the contract of carriage and it is, I think, for this reason that in many expressions of judicial opinion the measure of such damages has been referred to as being the value of the goods. The true measure of such damages, however, was, I think, somewhat more accurately

1968

CLUB COFFEE CO. LTD. v. MOORE-MCCORMACK LINES, INC. et al

Thurlow J.

expressed by Lord Esher, M.R. in *Rodocanachi v. Milburn*[1] when he said, at page 76:

> I think that the rule as to measure of damages in a case of this kind must be this: the measure is the difference between the position of a plaintiff if the goods had been safely delivered and his position if the goods are lost.

So expressed the measure of damages appears to me to coincide with the principle of *restitutio in integrum* and to be broad enough to include the whole of the owner's loss including, where the goods have reached Canada and he has thus become liable for customs duty on them, the amount of such duty. This, to my mind, becomes an element in the assessment of the damages flowing from the failure of the shipowner to deliver the goods at the port of discharge in the same way as the freight becomes an element to be taken into account. If the freight has not been paid it is deducted from the market value of the goods at the port of discharge in measuring the damages for failure to deliver because the owner would have had to pay it if the goods had been delivered. But if it has been paid it does not enter into the computation since the owner having paid the freight is entitled to the value of his goods landed at the port of discharge. In the same way, it appears to me that the owner of the goods having paid the freight and either paid or become liable for the customs duty is entitled to enough to replace them by purchase of like duty paid goods at the port of discharge. It is I think of some importance as well to remember that what the owner is entitled to recover in respect of the shipowner's failure to deliver his goods is damages, and that the value of the lost goods is but an element to be taken into account in assessing such damages. In my opinion such damages also include customs duty which the owner has paid or become liable to pay on the undelivered goods.

It was submitted on behalf of the defendants that the plaintiff was not obliged to enter and pay the duty on the whole of the shipment until it was delivered to him in bond but it does not seem to me to lie well with the defendant, who had advised the plaintiff of the arrival of its goods in Canada and had suggested that it make customs entry of them, to take the position that the plaintiff should not

[1] (1886) 18 Q.B.D. 67.

have paid the duty until the goods were in fact delivered, and ought thus to have attempted to shift to the Crown, if it sought to recover duty, the onus of showing that the missing goods were imported into Canada rather than upon the plaintiff to prove the contrary in order to obtain a refund. It does not, however, appear to me to be necessary to decide this point in the present case since on the evidence the probability appears to me to be that the missing goods were in fact imported into Canada and were lost at some later stage. On this point there is the statement made by Mr. Jewell on discovery, which I regard as an admission by the defendants, that the goods were on board when the ship left Boston which, coupled with the statement that she proceeded therefrom directly to Montreal, appears to me to support the inference and in addition there is the fact that after reporting the goods to the customs authorities as having been imported the defendants, whose responsibility it was to take care of the goods, did not report by an amending declaration nor provide the documentary evidence to establish that they were not in fact imported. There is also the fact, for what it is worth, that their inquiries at other ports at which the ship had called did not indicate that the missing coffee had been landed elsewhere. In my view therefore the missing coffee must be taken to have been imported into Canada and it follows from this that the plaintiff became and was liable to pay the duty thereon notwithstanding that the coffee was never delivered to it. It also follows, in my opinion, that the amount of the duty forms part of the plaintiff's loss flowing from the defendant's failure to deliver the coffee.

The only case cited on this question was that of *Town of Weston v. The Steamer Riverton*[2] where Maclennan L.J.A. said at page 72:

> The plaintiff includes in its action claims for duty, wharfage and handling charges on the shortage. Duty was paid to the Canadian Customs on the bill of lading quantity before the cargo was discharged and before the shortage in delivery was discovered. As soon, however, as the shortage was known it appears to me that the plaintiff was entitled to claim a refund of the duty paid on the shortage. That claim would be against the Customs authorities and cannot be maintained against the ship. The same observations apply to any overcharge made to plaintiff for handling and discharging the cargo. If

[2] [1924] Ex. C.R. 65.

1968

CLUB COFFEE CO. LTD. v. MOORE-MCCORMACK LINES, INC. et al

Thurlow J.

plaintiff paid more than it should have paid, its claim for reimbursement should have been made against the persons, who were employed to discharge the cargo and not against the ship.

It seems clear that on the facts before him Maclennan L.J.A. did not find that the missing coal had been imported into Canada and as the basis of his conclusion seems to be that duty was not in fact payable in respect of the missing coal the case is distinguishable on its facts from the present. Though the point was conceded rather than decided in favor of the cargo owners in *S.S. Ardennes (Cargo Owners) v. S.S. Ardennes (Owners)*[3] the situation in that case was, I think, nearer in principle to the present than that in the *Riverton* case. There additional customs duty became payable on a cargo by reason of unwarranted delay in delivery of the goods and the cargo owner recovered the amount as part of his damages.

I conclude, therefore, that the customs duty paid by the plaintiff in this case in respect of the coffee would ordinarily be an element to be taken into account in assessing the defendants' damages for the failure to deliver the coffee. There remains, however, a question whether to take it into account in this case is contrary to the terms of the bill of lading. Clause 13 of the bill of lading provided as follows:

> 13. In case of any loss or damage to or in connection with goods exceeding in actual value $500, lawful money of the United States, per package, or, in case of goods not shipped in packages, per customary freight unit the value of the goods shall be deemed to be $500 per package or per unit, on which basis the freight is adjusted and the carrier's liability in any capacity, if any, shall be determined on a value of $500 per package or per customary freight unit, unless the nature of the goods and a valuation higher than $500 shall have been declared in writing by the shipper upon delivery to the carrier and inserted in this bill of lading and extra freight paid if required; and in such case if the actual value of the goods per package or per customary freight unit shall exceed such declared value, the value shall nevertheless be deemed the declared value and the carrier's liability in any capacity, if any, shall not exceed the declared value. *Whenever less than $500 per package or other freight unit, the value of the goods in the calculation and adjustment of claims shall, to avoid uncertainties and difficulties in fixing value be deemed to be the invoice value, plus freight and insurance if paid, whether any other value be higher or lower.* (Italics added).

Clause 16 further provided:

> 16. This bill of lading shall be construed and the rights of the parties thereunder determined according to the law of the United States.

[3] [1951] 1 K.B. 55.

It was urged on behalf of the plaintiff that Clause 13 was contrary to the provisions of section 3(8) of the *Carriage of Goods by Sea Act* of the United States and, therefore, ineffective and void, and in support of this contention, counsel cited *Holden et al v. The S.S. "Kendall Fish"*, a decision of the United States District Court for the Eastern District of Louisiana[4] and the decision of Sidney Smith J. in *Nabob Foods Ltd. v. The Cape Corso*[5] interpreting a similar provision in the English *Carriage of Goods by Sea Act*, 1924. It was not disputed that the provision referred to would render Clause 13 of the bill of lading ineffective and void if the statute applies, but the preamble makes it clear that the statute applies only to bills of lading or similar documents of title which are evidence of a contract for the carriage of goods by sea "to or from" ports of the United States in foreign trade and it appears to me that whatever the contract for the carriage of these goods from the port of Rio de Janeiro may have been and whatever law might in the United States have been applicable thereto up to November 18, 1964, when the original bill of lading in respect of 500 bags of coffee was surrendered and the two new bills of lading for the carriage of the coffee to Montreal were issued, this being at a time when the ship had not yet reached any port of the United States, the contract of carriage was thereafter no longer one for the carriage of goods "to" or "from" ports of the United States. It follows, in my opinion, that the *Carriage of Goods by Sea Act* of the United States could not of its own force apply to govern the rights of the parties under the bill of lading, and on the material before the Court there is nothing which indicates that the terms expressed in the document are not valid and effective to regulate the rights of the parties as terms of the contract of carriage between them. Moreover, there is, in my opinion, nothing in Clause 1 of the bill of lading which renders Clause 13 and in particular the last sentence thereof ineffective or inapplicable in the present situation. Clause 1, as I read it, provides that the terms of the bill of lading shall govern except to the extent that they may be overridden by the application by its own force of either

[4] [1967] A.M.C. 327.

[5] [1954] Ex. C.R. 335.

1968

CLUB COFFEE CO. LTD. v. MOORE-MCCORMACK LINES, INC. et al

Thurlow J.

the *Carriage of Goods by Sea Act* of the United States or the *Water Carriage of Goods Act* of Canada, neither of which statutes seems to me to apply. Clause 1 then appears to me to go on to stipulate that when neither of these Acts applies of its own force the carrier is to have the same immunities which they provide when they do apply and certain additional immunities as well. There is also no evidence of any law of the United States which would call for an interpretation of the bill of lading or a measure of damages that would be different from that which would be given under the law of Canada.

In the view I take of the matter, however, Clause 13 and in particular the last sentence thereof, does not serve to relieve the defendants from liability for the customs duty paid by the plaintiff on the undelivered coffee. The clause and the particular sentence as well are undoubtedly concerned with the question of the damages to be paid in cases where goods are lost or damaged, but the sentence in question, which the defendants invoke, in my opinion, does not purport to prescribe the measure of damages where goods have been lost. The word "damages" does not even appear in the sentence. What the sentence appears to me to be intended to do is to provide for the calculation of the value of the lost goods as an element of their owner's damages for their loss by reference to their invoice value (plus the freight and insurance if, but only if, paid) and to substitute the result in the place of the result of a calculation based on the market value of the goods at the port of discharge, and the words "whether any other value be higher or lower" appear to me to refer to such market value, which might have increased or declined during the voyage and be higher or lower than the invoice value plus freight and insurance by the time the goods were due at the port of discharge, or to any other method of calculating the value of the goods as an element of their owner's damages.

The reference to "the value of the goods in the calculation and adjustment of claims" is, however, I think, to be read having regard to what the shipowner was obliged by his contract to do, that is to say, carry the goods to the port of discharge and deliver them there, leaving the payment of customs duty, if any, to their owner. So read, the

word "value" in the expression which I have quoted from Clause 13 refers to value which would have had to be taken into account as an element of damages for non-delivery if the goods had been lost at sea or had been destined for a place where no duty was imposed on their owner, and it would cover the same element of damages for failure to deliver in the present case. The clause does not appear to me to touch the question of the right of the plaintiff to have the amount of duty for which it has in the meantime become liable included as well in the calculation of its damages for the failure of the defendants to deliver the goods at Montreal.

The plaintiff will, therefore, have judgment for $6,668.57 representing the cost, insurance and freight items totalling $6,424.09, as to which there is no dispute, and $244.48 representing the duty at 2 cents per pound on 12,224 pounds of coffee not delivered. The plaintiff is also entitled to costs.