QUEBEC ADMIRALTY DISTRICT

1955
Dec. 19, 20
1956
Jan. 20

BETWEEN:

DEEP SEA TANKERS LIMITED and SHELL OIL COMPANY .... PLAINTIFFS;

AND

THE SHIP *TRICAPE* and HER OWNERS, TRITON STEAMSHIP COMPANY LTD. ..... DEFENDANTS.

*Shipping—Reference—Collision—Charterparty—No recovery for damages claimed for loss of use of vessel—Costs.*

Plaintiffs seek to recover damages for loss of the use of a vessel owned by one plaintiff and chartered by the other plaintiff due to detention necessary for repairs following a collision with defendant ship.

(1) [1892] P. 64.

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*Held:* That where the owners of a vessel are entitled to receive owners' hire in full throughout the period of detention of a ship due to damage caused by a collision and there is nothing in the Charterparty requiring them to repay or reimburse all or any part of this hire to the charterer neither the owners nor the charterer have the right to recover damages for loss of use of the vessel during the time required to make repairs necessitated by the collision.

REPORT of Referee.

The reference was heard before The Honourable Mr. Justice Arthur I. Smith, District Judge in Admiralty for the Quebec Admiralty District, at Montreal.

*Jean Brisset, Q.C.* for plaintiffs.

*C. Russell McKenzie, Q.C.* for defendants.

SMITH D.J.A. now (January 20, 1956) delivered the following judgment:

This matter comes before me following a reference to the Registrar for the assessment of damages due to the plaintiff, Deep Sea Tankers Limited, arising out of a collision between *Paloma Hills,* owned by them, and the defendants' ship *Tricape,* which occurred off the coast of Venezuela on the 21st day of March 1948.

By decree issued by this Court on the 27th day of March, 1951, the *Tricape* was held solely to blame for the said collision.

Subsequent to the issue of the said decree Shell Oil Company, Charterer of the *Paloma Hills,* was added as plaintiff. The owners and alternatively the charterer, seek to recover the same damages in respect of loss allegedly sustained by reason of the detention of the *Paloma Hills.* They claim these damages in virtue of Paragraph 5 of the Charterparty under which the *Paloma Hills* was being operated at the time of the collision. This paragraph, which is quoted hereinafter, purports to oblige the owners to credit the Charterer with monies received by the owners from third parties by way of compensation for the loss of use of the said vessel.

The claim of Deep Sea Tankers for the cost of repairing the *Paloma Hills* is not disputed. In fact, the defendants have deposited in Court an amount which they calculate to be sufficient to pay the said claim in full.

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On the other hand, defendants strenuously contest the right of either the owners of the *Paloma Hills,* or her Charterer, Shell Oil Company, to recover the damages claimed or any damages in respect of the alleged detention or loss of use of the said vessel on the ground that (a) insofar as the owners are concerned, there was no such loss or damage since they received from the Charterer owners' hire in full throughout the entire period of the detention; and (b) insofar as the Charterer is concerned no right of action lies against the defendant vessel.

It is proposed to deal first with the claim advanced on behalf of the Charterer, Shell Oil Company, and, in view of the conclusion which I reach concerning the principal objection raised against this claim, it will be unnecessary to deal with the various subsidiary grounds of defence advanced on behalf of the defendants.

The Charterparty under which the plaintiff, Shell Oil Company, was operating the *Paloma Hills* was a time-charter which contained an express exclusion of any demise of the vessel to the Charterer and which left possession and control of the *Paloma Hills* in the hands of the owners. Such being the case, any right which the Charterer had in respect of the loss of use of the said vessel, and certainly any arising under Paragraph 5 of the said Charterparty was merely contractual and one in respect of which the Charterer had no right of action against the wrongdoing vessel.

The foregoing proposition is amply supported by the jurisprudence and was not seriously disputed by Counsel for the plaintiff, nor was I referred to any authority to a contrary effect.

*The Merida* (1), Mr. Justice Hill, at page 91:

> This being so, it seems to me that as the French Government were neither the owners of the ship, nor in possession of her, all that can be said for the French Government is that they had the use of the ship under a contract and therefore damages to the French Government arise only because, under the terms of the contract they continued liable to make certain payments to the owners while getting no benefit from the ship during the period of detention. In these circumstances the French Government had no cause of action arising out of the negligence of the *Merida*. That means this: that if there is to be any recovery at all it can only be a recovery by the owners.

(1) (1921) 9 Ll.L.L.R. 90

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It may be that after the owners recover they will have to account for some of their recovery, as between themselves and the French Government, but whether they do so or not is irrelevant to the wrongdoers. The sustainable claim must be a claim by the owners in their own right.

This judgment was confirmed in Appeal (1). (In the *Merida* case there was no dispute concerning the damages actually sustained by the owners).

*Elliott Steam Tug Company Limited* v. *The Shipping Controller* (2):

> The Charterer in collision cases does not recover profits, not because the loss of profits during repairs is not the direct consequence of the wrong, but because the common law, rightly or wrongly, does not recognize him as able to sue for such an injury to his merely contractual rights.

And at page 141:

> The Charterer then has no common law right against the person who deprives him of the opportunity of earning profits by his contractual rights, by taking away the ship in respect of which he had a contract.

In the present case the Charterer is not claiming for loss of profits, or for damages caused to it by the loss of use of the *Paloma Hills*. On the contrary, no proof of such loss or damage was made and the Charterer's claim, if any, derives from Paragraph 5 of the Charterparty. While under this provision, the Charterer would have the right to claim from the owners credit for such monies as the owners might have recovered from third parties as compensation for the loss of use of their vessel, the Charterer had no right of action against the defendants as wrongdoers and it is unnecessary to add that if the Charterer had no such right the owners, acting as Trustees or otherwise for the Charterer, had none.

See also *Remorquage A Helice* v. *Bennetts* (3); *Simpson* v. *Thomson* (4).

The real contest on the present proceedings therefore relates to the right of the owners of the *Paloma Hills* to recover damages which they allege they have sustained by reason of the loss of use of the said vessel during the time required to effect repairs to her.

This right is strongly contested on the simple ground that the owners of the said vessel have sustained no such loss, or damage, since they were paid by the Charterer the full owners' hire stipulated in the Charterparty, throughout the entire period of detention.

(1) 9 Ll.L.R. 464.
(2) [1922] 1 K.B. 127 at 140.
(3) [1911] 1 K.B. 243.
(4) (1877) 3 Asp. N.S. 567.

On the other hand, owners, relying upon the special terms of the said Charterparty and particularly upon Paragraph 5 thereof, claim the right to recover damages allegedly sustained as a result of the loss of use of their vessel.

Paragraph 5 of the Charterparty reads as follows:—

If any vessel shall be laid up or delayed for any period on account of circumstances beyond the control of Owner and its agents, or if any vessel shall be requisitioned, captured or interned for any period, the Charterer shall nevertheless continue to be liable to Owner for Owner's hire as defined in Paragraph 3B hereof during such period. Out of and to the extent of the sums received by Owner as hire, compensation, indemnity, damages or otherwise from any government, agency, insurer or other Third Party in respect of any events mentioned in this paragraph, Owner shall reimburse Charterer for all sums paid in any manner by Charterer, as Owner's hire hereunder for such period and any balance then remaining shall be applied by Owner as promptly as possible to the prepayment or retirement of indebtedness secured by any then existing mortgage on such vessel and if there be no such indebtedness so secured, to the prepayment or retirement of any other then existing indebtedness of Owner incurred in connection with such vessel or vessels.

It is noteworthy that under this clause the Charterer is obligated to pay full hire throughout the total period of detention and that the owners are entitled to retain said hire unconditionally, but are obligated to credit the Charterer with such monies, if any, as owners they may receive from third parties by way of compensation for loss of use.

Counsel for plaintiff relied upon the holding in the *Mergus* case (1).

However, a careful examination of the judgment rendered in that instance satisfies me that it is clearly distinguishable from the present case and that it does not support the claim made by the owners for damages for detention.

In the *Mergus* case the owners succeeded in recovering damages for loss of use because it was held that under the terms of the Charterparty the obligation of the Charterers to pay hire ceased from the moment detention began. In such circumstances, the owners had lost, or been deprived of hire during the period of detention, and this loss they were held entitled to recover from the offending vessel.

Not so in the present case. On the contrary, the owners here were entitled to receive, and in fact did receive, owners'

(1) (1947-48) 81 Ll.L.L.R. 91.

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hire in full throughout the period of detention and there is nothing in the Charterparty which required them to repay or reimburse all, or any part, of this hire to the Charterer. It is true that there is a stipulation that if owners receive from third parties compensation for detention of the vessel they will be obliged to credit Charterer with such monies. This, however, has nothing to do with the owners' hire due under the Charterparty which the owners have received and are entitled to retain in full. The distinction between the present case and that of the *Mergus* is emphasized by reference to the following remarks of Mr. Justice Wilmer, in the *Mergus* case, page 95:

> It is conceded on the one side that if the owners of the *Kul* properly repaid these sums to the Charterers, then there is nothing to prevent them from recovering said items from the wrongdoers. Equally, it is conceded on the other side, that if the owners of the *Kul* were wrong in repaying these sums to the Charterers, they cannot by making such a wrong and unnecessary payment put themselves in a position to render the wrongdoers liable.
>
> The question, therefore, is whether under the charterparty, as amended (if it is amended) by the addendum, the owners of the *Kul* were liable to repay these sums to the Charterers in the events which happened.

And at page 96:

> It seems to me that I must ask myself this question: In the events which happened, would the owners of the *Kul* have a good claim against the owners of the *Mergus,* as the wrongdoers, if the charterers' liability for hire ceased at the commencement of the period of detention? It seems to me that I can only answer that question in one way. If the charterers' liability had ceased, quite clearly the owners would have a good claim for loss of hire against the wrongdoers . . . If that is the case then it seems to me to follow upon the plain meaning of the words that the charterers are under this addendum clause relieved from liability. That being so, it seems to me to follow that when the owners repaid to the charterers the sums in respect of these three items which had been paid by the charterers in the first instance they were paying what they were legally liable to pay under that clause. If that is right, it seems to me to follow that having properly paid those amounts they are entitled to recover them from the owners of the wrongdoing vessel.

I reach the conclusion therefore that neither the owners, nor the Charterer, have the right to recover the damages claimed for loss of use of the *Paloma Hills* during the time required to make the repairs necessitated by the collision. The objection that in the result the offending vessel will

escape liability in respect of part of the damages consequent upon its wrongdoing cannot avail and in this connection the following remarks of Bankes, L.J., who rendered the judgment in the Court of Appeals in the case of the *Merida* (*supra*) appear to be apposite:

> A second point is taken by Mr. Leck. He says that these wrongdoers ought not to be allowed to get off so lightly, and that looking at the matter as between the owners of the vessel and the wrongdoers merely, the wrongdoers ought to pay to the full for the damage sustained by their wrongdoing; and, he says, for a reason I do not quite follow, from this point of view the owners stand in a better position than the French Government, and although the French Government cannot recover any damages, and although, so far as the wrongdoers are concerned, they, the owners, have received from the wrongdoers the whole loss they have sustained, nevertheless, they, the owners, are entitled to say to the wrongdoers "you must pay something more". I confess I cannot follow the argument. It seems to me that if the damages are not recoverable by the French Government because the French Government have no right which alone would entitle them to recover them, it does not lie in the mouth of the owners to say they are in a better position.

Reference should be made to the allegations contained in plaintiff's Statement of Claim on the Reference to the effect that Deep Sea Tankers is a wholly-owned subsidiary of the Charterer, Shell Oil Company. In my humble opinion both these allegations, and such proof thereof and in respect of the relationship said to exist between the two companies and their *modus operandi,* as was allowed under reserve of defendants' objection are entirely irrelevant and must be disregarded.

Deep Sea Tankers and Shell Oil Company are two separately incorporated companies each being a legal entity with a personality separate and distinct from that of the other and the Charterparty entered into by them must be construed and given effect to in the same way as if the owners and Charterer were two natural persons.

*Salomon* v. *Salomon* (1) Lord Halsbury:

> . . . It seems to me impossible to dispute that once the Company is legally incorporated, it must be treated like any other independent person with its rights and liabilities appropriate to itself and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discovering what these rights and liabilities are.

As above stated, the amount claimed in respect of the damage to the *Paloma Hills* is not disputed and the defendants have already deposited the sum of $20,000 on account

(1) [1897] A.C. 22.

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of this claim and at the hearing contented themselves with merely putting plaintiffs to the proof of the various items of damage claimed.

In my opinion the claim in respect of temporary and permanent repairs to the *Paloma Hills* made necessary by the said collision, totalling the sum of $19,243.77, and set out in detail in the Statement B annexed to the plaintiffs' Statement of Claim on the Reference has been supported by satisfactory proof and should be accepted.

I accordingly report that the damages which the plaintiffs are entitled to recover in virtue of the decree issued herein on the 27th of March, 1951, are assessed at the said sum of $19,243.77, plus interest at the rate of 5% per annum calculated in respect of the various items which make up the sum of $17,192.22 shown in Statement B from the dates upon which said items respectively were paid and on the sum of $2,051.55 from July 1, 1948.

Having regard to the fact that the defendants insisted upon the production of formal proof in respect of the various items comprising plaintiffs' Statement of Claim, and considering, on the other hand, that the proceedings taken by plaintiff to add Shell Oil Company as a plaintiff for the purposes of the Reference are unfounded and useless, the cost of the Reference will be borne equally by the plaintiffs and the defendants.

*Judgment accordingly.*