
THE QUEBEC ADMIRALTY DISTRICT

BETWEEN:

DELANO CORPORATION OF AMERICA, . . . PLAINTIFF;

AND

SAGUENAY TERMINALS LIMITED, . . . DEFENDANT.

1965
Mar. 22

Shipping—Trial of an issue—Contract of carriage of goods—Damage to goods in transit—Bill of lading—Demise clause in bill of lading—Privity of contract between owner of goods and charterer of ship—Charterer of ship as agent of owner of ship—Charterer by demise—

¹ [1965] 1 Ex. C.R. 71

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Failure of charterer to inform owner of goods that it is not owner or charterer by demise of the ship.

Practice—Trial of an issue question of law—Exchequer Court Rule 149.

This hearing resulted from a motion by the defendant to have an issue tried and decided before the trial of the action herein, the issue being whether or not paragraphs 1 and 2 of the Statement of Defence are well founded in law, that is, whether or not there was a contractual relationship or privity of contract between the plaintiff and the defendant in respect of the carriage of the plaintiff's goods in the m.v. *Sunamelia*.

The action resulted from the carriage of 500 bags of potatoes owned by the plaintiff from Halifax, Nova Scotia to Maracaibo, Venezuela on the m.v. *Sunamelia*, the plaintiff alleging that the potatoes were damaged beyond use while in the care and possession of the defendant, which is liable to the plaintiff therefor in contract and for negligence.

The defendant alleged that the Bills of Lading which were signed by one G. Cooke, the defendant's representative, contained provisions that unless the defendant was the owner or charterer by demise of the vessel in which the goods were being carried the Bills of Lading would take effect only as a contract with the owner or demise charterer, the defendant being agents only and under no personal liability.

Held: That in circumstances such as those under which the Bills of Lading on which the plaintiff's action is based were signed, the Time Charterer (the defendant) being neither the owner of the vessel nor its possessor under a demise charter, in signing the Bills of Lading acts only for and is the agent of the owner of the vessel.

2. That the contract clearly stipulates that if the defendant was neither the owner nor the charterer by demise there was to be no contractual relationship between the plaintiff and the defendant in regard to the carriage of the plaintiff's merchandise, the mere fact that the defendant was neither the owner nor the charterer by demise being all that is necessary to make this so. The defendant was not required to notify or make the plaintiff aware that it was neither the owner nor the charterer by demise.
3. That the plaintiff, by accepting the Bills of Lading in the terms in which they were drawn is bound by the condition excluding privity of contract as between the plaintiff and the defendant in the case where the defendant was neither owner of the vessel nor in possession of it under a demise charter.
4. That it is an express condition of the contract of carriage to which the plaintiff was a party that unless the defendant was either the owner or the charterer by demise it was not to be considered as acting in its own name and the contract was deemed to be one between the plaintiff and the owner of the vessel.
5. That since there was no privity of contract as between the plaintiff and the defendant in respect of the contract of carriage, the Court would be obliged to maintain the defence in law and dismiss the plaintiff's action, if this were the sole issue involved.
6. That paragraphs 1 and 2 of the defendant's Statement of Defence are declared to be well founded.

MOTION to have an issue tried and decided before trial.

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

William Tetley for plaintiff.

L. S. Reycraft, Q.C. for defendant.

SMITH, D. J. A. now (March 22, 1965) delivered the following decision:

The Court, having heard the parties by their respective Attorneys in regard to the question of law as to whether the defendant's plea, that there is an absence of privity of contract between the parties, is well founded, having examined the proceedings and exhibits filed and duly deliberated:

By its action the plaintiff claims the sum of \$2,375.00, alleged to represent the value of a shipment of 500 bags of potatoes entrusted to the defendant for carriage in the m.v. *Sunamelia* from Halifax, Nova Scotia to Maracaibo, Venezuela.

The plaintiff's action is based mainly upon an alleged Contract of Carriage evidenced by two Bills of Lading dated Halifax, December 18, 1954 and signed by the defendant's representative, one G. Cooke, (Exhibit D-2).

The plaintiff alleges that the said goods were so damaged as to be rendered a total loss, while in the care and possession of the defendant who, in virtue of the said Contract of Carriage, as well as by reason of its fault and negligence, is legally responsible to the plaintiff for said loss.

One of the principal grounds of defence raised is that there was no contractual relationship or privity of contract between the plaintiff and the defendant in view of the terms of the said Bills of Lading, which expressly provide that unless the defendant was the owner, or charterer by demise, of the vessel in which the goods were being carried said Bills of Lading would "take effect only as a contract with the owner or demise charterer", the defendant being agents only, and under no personal liability.

This ground of defense is raised by paragraphs 1 and 2 of the Statement of Defence which are in the following terms:

1. In answer to paragraph 1 of the Plaintiff's Statement of Claim the defendant states that Bills of Lading Nos. 28 and 29 dated December 18th, 1954, at Halifax Nova Scotia, and not dated September 18th, 1954, as stated

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in the Plaintiff's Statement of Claim, comprise the contract of carriage and that said Bills of Lading speak for themselves, and the Defendant invokes all the terms, conditions and exceptions of said Bills of Lading and, more particularly, paragraph 17 of the Conditions of Carriage, which reads as follows:—

17. PARTIES TO CONTRACT:—If the Ship is not owned by, or chartered by demise to Saguenay Terminals Limited (as may be the case notwithstanding anything that appears to the contrary) this Bill of Lading shall take effect only as a contract with the owner or demise charterer as the case may be as principal, made through the agency of the said Saguenay Terminals Limited, who act as agents only, and who shall be under no personal liability whatsoever in respect thereof. otherwise the allegations contained in said paragraph are denied.

2. The Defendant further states that said Bills of Lading Nos. 28 and 29, dated at Halifax, Nova Scotia, on December 18th, 1954 were signed on behalf of and under the authority of the Master of the S.S. *Sunamelia* and that under the terms and conditions of the said Bills of Lading, as the said vessel was not owned by or chartered by demise to the Defendant, the said Bills of Lading took effect only as a contract between the Plaintiff and the Owner of the S.S. *Sunamelia* as the carrier and the Defendant further states that there is no privity of contract between the Plaintiff herein and the Defendant.

On December 18, 1959 Counsel for the defendant gave Notice of Motion presentable December 22, 1959 (the case having previously been set down for that date) asking that the issue of privity of contract raised by paragraphs 1 and 2 of the Statement of Defence be first heard and decided and the trial of all other issues be postponed.

The trial did not take place on December 22, 1959 and the defendant's motion was held in abeyance.

On September 23, 1963 the plaintiff made a motion to have a date fixed for the trial which motion was heard on October 2, 1963 and the case set down for trial on February 25, 1964.

For some reason, which does not appear, the trial did not proceed on February 25, 1964 but on or about September 25, 1964 Counsel for both parties attended before me with respect to the setting down for trial of a number of cases including this one. The defendant's motion to have the question of privity of contract heard and decided prior to the trial of the other issues was discussed and Counsel agreed that the said question of law should be argued and decided prior to the trial of the other issues, and the Court, considering that the adoption of such a course would be in the interests of justice, ordered that the hearing on the said question of law should take place on January 8, 1965.

On January 8, 1965 Counsel for both parties appeared before me and although Counsel for the plaintiff, at that

time, indicated a certain reluctance to proceed on the question of law he appears to have withdrawn his objection and he participated in the proceedings without further objection or reserve and submitted written argument in respect of the said issue of law.

In ordering that the said question of law should be argued and decided prior to the trial of the other issues the Court acted, not only in virtue of the agreement of Counsel, but in accordance with the discretion vested in it by rule 149 of the Exchequer Court Rules.

The sole issue therefore which is at present before the Court is whether or not paragraphs 1 and 2 of the Statement of Defence are well-founded in law. The Court is required to decide whether or not there was contractual relationship or privity of contract between the plaintiff and the defendant in respect of the carriage of the plaintiff's goods in the m.v. *Sunamelia* on the voyage above-mentioned.

There were produced in the record, without objection or reserve, the Time-Charter under which the said vessel was being operated by the defendant, as well as the Bills of Lading upon which the plaintiff mainly bases its action. The execution of these documents has not been challenged and the issue of law now before the Court must, in my opinion, be decided on the basis of these documents.

The two Bills of Lading (Exhibit D-2) are dated Halifax, Nova Scotia, December 18, 1954. At the top of each is printed the heading "Bill of Lading" and on the line immediately beneath this is the name "Saguenay Terminals Ltd., Montreal".

Both documents are signed with the printed name "Saguenay Terminals Ltd." and on the line immediately beneath that appears the signature of one "G. Cooke", below which appears the designation "Master or Agents".

Apparently "G. Cooke" was an employee of the defendant who signed in virtue of the written authority executed by the Master of the m.v. *Sunamelia* on November 9, 1953 (Exhibit D-3).

Immediately above the signature appears the following clause:

In accepting this Bill of Lading the shipper, consignee, owner of the goods and the holder of the Bill of Lading expressly agrees to all its terms, conditions and exceptions, whether written, printed, stamped or incorporated.

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Therefore Clause 17 of the Bills of Lading, hereinabove quoted contains terms and conditions which are binding upon the plaintiff.

The Charter-Party entered into between the owners of the vessel and the defendant contains the following provisions:

8. The Captain (although appointed by the Owners) shall be under the orders and directions of the Charterers as regards employment and agency; and Charterers are to load, stow and trim the cargo at their expense under the supervision of the Captain, who is to sign Bills of Lading for cargo as presented, in conformity with Mate's or Tally Clerk's receipts.

26. Nothing herein stated is to be construed as a demise of the vessel to the Time Charterers. The Owners to remain responsible for the navigation of the vessel, insurance, crew and all other matters, same as when trading for their own account.

On behalf of the defendant it is submitted that, since it was neither owner nor charterer by demise of the m.v. *Sunamelia* it must, in virtue of the foregoing clause, be held to have signed said Bills of Lading solely in a representative capacity as agent for the owner, and there is no lien de droit or privity of contract between the parties, in so far as the alleged contract of carriage is concerned.

The plaintiff, in its written argument, submits that there are two contradictory judgments relating to the point at issue, one rendered by this Court in the case of *Apex (Trinidad) Oilfield Ltd. v. Lunham & Moore Shipping Ltd.*¹ and the other rendered in the United States, namely *Epstein v. U.S.A.*² In fact however, there are several other judgments or authorities bearing on the issue, to at least some of which references were made in the *Apex* case. They are as follows:

Hassneh Insurance Co. Ltd. et al. v. Sargena Company et al. Civil case no 152/66 in the District Court of Haifa and in the Supreme Court, Court of Appeals no 328/58. It is noteworthy that Clause 17 of the Bill of Lading involved in that case was in terms almost identical to those of the Clause 17 of the Bills of Lading relied upon in the present case.

*The Aristo*³.

Under Canadian Law, governing a voyage from Canada to Bermuda, the sub-charterer who signs bills of lading (with or without its own printed name) for Master and Owners or "for the Master without disclosure that the vessel is chartered and that claims must be enforced solely against the ship and Ship-owner, does not thereby become bound as a carrier; the ship-owner, being the carrier; hence the sub-charterer is not liable for loss of cargo by negligent stranding and the question of whether the vessel was seaworthy or whether due diligence had been used to make her so does not arise in a suit against the sub-charterer.

¹ [1962] 2 Lloyd's Rep. 203.

² (1945) A.M.C. 1598.

³ (1941) A.M.C. 1744.

*Patterson Steamship Limited v. Aluminum Co. of Canada*¹.
*Valkenburg, K-G v. SS. Henry Benny No. 9*²

It appears to be now settled therefore that, in circumstances such as those under which the Bills of Lading on which the plaintiff's action is based were signed, the Time Charterer, being neither the owner of the vessel nor its possessor under a demise charter, in signing said Bills of Lading acts only for, and is the agent of, the owner of the vessel.

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The contract clearly stipulates that if Saguenay Terminals Ltd. was neither the owner nor the charterer by demise there was to be no contractual relationship in regard to the carriage of the plaintiff's merchandise between the plaintiff and the defendant. The mere fact that the defendant was neither the owner nor the charterer by demise is all that is necessary to make this so. There is nothing which required Saguenay Terminals Ltd. to notify or make the plaintiff aware that it was neither the owner nor the charterer by demise. Had the plaintiff wished to know the identity of the owner of the vessel or whether the defendant was in possession of it under a demise charter, it could have insisted upon being supplied with this information prior to accepting these Bills of Lading. It did not do so however. On the contrary it accepted the said Bills of Lading including the clause which expressly excluded privity of contract as between the plaintiff and the defendant in the case where the defendant was neither owner of the vessel nor in possession of it under a demise charter. The plaintiff, by accepting said Bills of Lading in the terms in which they are drawn is bound by this condition. The case is not to be assimilated to that of a mandatory acting in his own name (Article 1716 CC). It is clear from the Bills of Lading (Clause 17) that it is an express condition of the Contract of Carriage to which the plaintiff was party, that unless the defendant was either the owner or the charterer by demise, it was not to be considered as acting in its own name and the contract was deemed to be one between the plaintiff and the owner of the vessel.

The Court therefore reaches the conclusion that there was no privity of contract as between the plaintiff and the defendant in respect of the Contract of Carriage alleged and that paragraphs 1 and 2 of the Statement of Defence are

¹ [1951] S.C.R. 852, Rand J. at p. 854.

² (1961) A.M.C. 2221.

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well founded, and if this were the sole issue involved, the Court would be obliged to maintain the defence in law and dismiss the plaintiff's action.

However, on behalf of the plaintiff it was argued that the plaintiff's action is based not merely on allegations of contractual fault but also contains allegations of fault and negligence which, if proven, would entitle the plaintiff to succeed. A careful examination of the allegations of plaintiff's Statement of Claim satisfies me that such is the case. There are various allegations of fault and negligence, some of which at least, if proven, might conceivably engage the personal liability of the defendant even if, it was acting solely as an agent of the owner.

An agent, even though acting as such, may nevertheless render himself personally responsible towards third persons for loss or damage occasioned to them by his fault or negligence. CC 1053, CC 1106, CC 1709 *et seq.*, and CC 1715 *et seq.*

The Court concludes therefore that the issue of law raised by paragraphs 1 and 2 of the defendant's Statement of Defence must be decided in favour of the defendant and the defence of lack of privity of contract upheld.

On the other hand, it finds that the Statement of Claim contains allegations of delictual fault which, if proved, might well engage the responsibility of the latter even although it may have been acting for and on behalf of the owner.

On the present proceedings therefore in so far as they relate solely to the question of whether or not there was privity of contract between the plaintiff and the defendant the Court concludes that this issue must be decided against the plaintiff.

CONSEQUENTLY, paragraphs 1 and 2 of the defendant's Statement of Defence are declared to be well founded and the costs of the present proceedings on the issue of law are assessed against the plaintiff.