Privy Council Appeal No. 72 of 1933.

Paterson Steamships, Limited - - - - - *Appellants*

v.

Canadian Co-operative Wheat Producers, Limited - - - *Respondents*

FROM

THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE)

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 26TH JULY, 1934.

Present at the Hearing:

LORD ATKIN.
LORD TOMLIN.
LORD MACMILLAN.
LORD WRIGHT.
SIR LANCELOT SANDERSON.

[*Delivered by* LORD WRIGHT.]

The appellants were sued as the owners of the steamship "Sarniadoc," which on the 29th November, 1929, stranded at Main Duck Island at the eastern end of Lake Ontario and became practically a total loss: the respondents sued as owners of a parcel of wheat and barley, being part cargo of the "Sarniadoc" when she stranded, and in the action claimed damages in respect of the loss of the grain consequent on the stranding. The respondents have succeeded before the trial Judge and before the Court of King's Bench (in Appeal) for the Province of Quebec, Bond, J., dissenting. The appellants now appeal. No question of amount need here be considered.

The respondents' parcel had been transhipped at Port Colborne and was being carried under the terms of a bill of lading which contained the clause "This shipment is subject

to all the terms and conditions and all the exemptions from liability contained in the Water Carriage of Goods Act," that is the Canadian Act of 1910 so entitled ; it will accordingly be necessary to consider the provisions of that Act in relation to the facts of the case.

The " Sarniadoc " was only partially loaded, her actual draft being about 14 feet as compared with a fully loaded draft of 15 feet 6 inches. She had two holds, which cannot have been full of grain. She was bound to Montreal, where it was intended to keep the grain in the holds over the winter. She came out of the Welland Canal at Port Dalhousie and entered Lake Ontario at 2.15 p.m. on the 29th November, 1929. The master was at first apprehensive of the weather, and thought it was more prudent to take a northerly course in the direction of Toronto, where she might have remained with the cargo over the winter. But about 4.10 p.m., thinking the weather more favourable, he decided to proceed on an easterly course down the Lake. At night the weather got worse and the wind increased to a westerly to west-north-westerly gale. The temperature fell to zero, with heavy snow. When passing Peter Point Light about 3 a.m. on the 30th November, 1929, the master did not succeed in getting a satisfactory bearing, but he proceeded till about 6 a.m., when he reduced speed, being uncertain of his position. He decided, he says in his evidence, to make for Main Duck Island in order to shelter under it, instead of turning at the appropriate position northwards in order to make Kingston, which was on the course for Montreal. At about 7.10 a.m. the trees of the Island were suddenly seen about three-quarters of a mile distant. The master at once put his ship about to beat off the lee shore, but, owing to the force of the wind and sea, the vessel's head fell off, and she stranded on the reef at the northerly end of the island, where she remained fast and broke her back.

At a wreck enquiry held at Toronto on the 9th January, 1930, the Dominion Wreck Commissioner, sitting with two Nautical Assessors, found that the master was in default, and that the stranding was caused by his default ; it was found that from the outset proper and ordinary judgment was not exercised.

At the trial, the master, in his evidence, was not prepared to say that the ship was seaworthy, and when challenged to explain why he kept on an easterly course instead of turning on a northerly course to Kingston, gave answers which were susceptible of the meaning that he did not do so because he knew the cargo might be liable to shift, and he was accordingly afraid to turn the ship on a course which would put her in the trough of the sea, though he also said that he decided to seek shelter because of bad weather conditions and poor visibility.

The circumstances of the loss appear to be somewhat peculiar, but their Lordships have come to the conclusion that for the

purposes of this appeal they must accept the concurrent findings of fact arrived at by the trial Judge and by the majority of the Court of Appeal. These findings may be summarised as being (1) that the ship was unseaworthy in that the grain cargo was loaded in bulk and without shifting boards or other precautions to keep it from shifting, and that the owners had not exercised due diligence to make her seaworthy, and (2) that this unseaworthiness was the cause of the loss, in the sense that the master had been apprehensive that his cargo, stored as it was, would shift if he were to put the vessel on the proper course, which would have involved putting her in the trough of the sea, and for that reason did not do so, whereas if he had felt able to take that course he would have cleared the shoal on which he stranded. The finding of the Court below on this point was that there was in a sense bad navigation, but the navigation was justified by the master's legitimate fears. Rivard J. thus sums up the position : " Car il ne semble pas douteux que l'échouement du ' Sarniadoc ' ait été le résultat d'une manœuvre erronée en soi, mais que le maître dut adopter, parce que la marche normale du vaisseau l'aurait mis au creux de la lame, avec danger de désarrimage des grains. Le naufrage et une perte totale auraient pu résulter d'un désarrimage dans ces conditions, la manœuvre adoptée pour éviter ce désastre a causé l'échouement et une perte partielle. Erreur de navigation, mais justifiée, chez le maître, par la crainte d'un désarrimage possible et qui en effet devait être prévu."

The view of the case which found favour with Bond J., who dissented in the Court of Appeal, was that the stowage of the grain did not render the vessel unseaworthy, but that the loss was due to errors in navigation which, in his view, seem to have mainly consisted in the action of the master in proceeding down the Lake in heavy weather with snowstorms without verifying his position by means of accurate bearings or soundings, until he suddenly found himself about ¾ of a mile off main Duck Island ; the action he then took was not in the view of the judge " influenced to any appreciable extent by a consideration of the likelihood of the cargo shifting." On this view of the facts which seems to represent the case principally relied on by the appellants, Bond, J., held that the appellants were entitled to succeed under the Water Carriage of Goods Act. But the trial Judge and the majority of the Court of Appeal, having found that the loss was caused by unseaworthiness, held that the provisions of the Act rendered the appellants liable.

Their Lordships regard these findings of the Courts below as findings of fact. It is true that in some cases a finding that a ship was unseaworthy may be a mixed finding of fact and law ; thus in *Elder Dempster & Co., Ltd.* v. *Paterson, Zochonis & Co., Ltd.* [1924] A.C. 522, where the facts were not in dispute, it depended on construction of law whether these facts amounted

to bad stowage or to that type of unseaworthiness which does not endanger the ship, but involves damage to the cargo in her. In the present case, however, the question was whether the loading of the grain without any precaution to guard against shifting, particularly where the holds were not fully loaded, endangered the safety of the vessel and made her unfit for the adventure as a ship. That was a question of fact. Equally it was a question of fact whether due diligence had been exercised to make the vessel seaworthy: the answer did not depend on the construction of any legal regulation; it was agreed that the standard of the duty which applied in the case of the "Sarniadoc," which was registered in Great Britain, was to be found in section 452 (1) of the Merchant Shipping Act, 1894; all that is required by that section is that all necessary and reasonable precautions should be taken in order to prevent the grain cargo from shifting: what was necessary and reasonable in all the circumstances of the case, including the practice alleged by the appellants to prevail in the Canadian Lakes grain trade to do nothing but level off the grain in the hold, could only be determined as an issue of fact. Equally was it a question of fact whether the unseaworthiness found to exist did or did not cause the casualty. It cannot properly be said that the causation which the Judge found to have operated was too remote in law.

This Board has said in a judgment delivered by Lord Dunedin in *Robins* v. *National Trust Co.* [1927] A.C. 515, on an appeal from the Supreme Court of Ontario, that it is not a cast-iron rule that the Board will not "examine the evidence in order to interfere with the concurrent findings of two Courts on a pure question of fact." The rule is one of conduct which the Board has laid down for itself, and is not a rule based on any statutory provision. Their Lordships in the present case can discover no error in law which could vitiate the findings, still less anything that could be said to involve a miscarriage of justice. The loss of this vessel is somewhat difficult to explain, even allowing for the storm and the bad visibility. A plausible suggestion that she was lost because of deficient engine power, that is, another form of unseaworthiness, has been unanimously rejected by all the Judges below, and was not even argued before their Lordships. There remain the rival findings of Bond, J., on the one side and of the other Judges on the other. Their Lordships can see no ground whatever in all the circumstances of this case for interfering with the concurrent findings of both the Courts which have considered the matter.

To determine how these findings affect the obligations of the parties, it is necessary to examine the terms of the Water Carriage of Goods Act, 1910, which is incorporated in the contract under which the grain was being conveyed. The terms of the Act have been the subject of argument before this Board, and must now be considered. Except for a decision of this Board

in *Royal Exchange Assurance Corporation* v *Kingsley* [1923] A.C. 235, there is apparently no authority on its construction: at least their Lordships have not been referred to any, and they have not themselves been able to find any. The Act, however, has a certain kinship with similar legislation in other countries on the same subject matter, in particular, with the United States Harter Act, 1893, and the later Acts, the New Zealand Sea Carriage of Goods Act, 1922, and the British Carriage of Goods by Sea Act, 1924, with which in substance the Australian Act of 1924 is identical. These Acts differ in general scheme and framework from the Canadian Act, but in certain respects decisions under them may be helpful in construing the Canadian Act. And all these Acts agree in this respect, that they super-impose statutory restrictions on the freedom possessed by the shipowner at common law to restrict his liability as carrier, and at the same time give him the benefit of statutory provisions in his favour. These Acts accordingly cannot be understood or construed except in the light of the shipowners' common law liability and the usual methods of limiting that liability previously in vogue.

It will therefore be convenient here, in construing those portions of the Act which are relevant to this appeal to state in very summary form the simplest principles which determine the obligations attaching to a carrier of goods by sea or water. At common law, he was called an insurer, that is he was absolutely responsible for delivering in like order and condition at the destination the goods bailed to him for carriage. He could avoid liability for loss or damage only by showing that the loss was due to the act of God or the King's enemies. But it became the practice for the carrier to stipulate that for loss due to various specified contingencies or perils he should not be liable: the list of these specific excepted perils grew as time went on. That practice, however, brought into view two separate aspects of the sea carrier's duty which it had not been material to consider when his obligation to deliver was treated as absolute. It was recognised that his over-riding obligations might be analysed into a special duty to exercise due care and skill in relation to the carriage of the goods and a special duty to furnish a ship that was fit for the adventure at its inception. These have been described as fundamental undertakings, or implied obligations. If then goods were lost (say) by perils of the seas, there could still remain the enquiry whether or not the loss was also due to negligence or unseaworthiness. If it was, the bare exception did not avail the carrier.

In the concise words of Willes, J. (in *Notara* v. *Henderson*, L.R.7 Q.B. 225, at p. 235), " the exception in the bill of lading only exempts the shipowner from the absolute liability of a common carrier, and not from the consequences of the want of reasonable skill, diligence and care." Willes, J., is there referring to what may be called the specific excepted perils. The position is thus

summed up by Lord Sumner in *Bradley & Sons* v. *Federal Steam Navigation Co., Ltd.*, 27 Ll. L. Rep. 395, at p. 396, " The bill of lading described the goods as shipped in apparent good order and condition . . . it was common ground that the ship had to deliver what she received as she received it, unless relieved by excepted perils. Accordingly, in strict law, on proof being given of the actual good condition of the apples on shipment and of their damaged condition on arrival, the burden of proof passed from the assignees to prove some excepted peril which relieved them from liability and further, as a condition of being allowed the benefit of that exception, to prove seaworthiness at Hobart, the port of shipment and to negative negligence or misconduct of the master, officers and crew with regard to the apples during the voyage and the discharge in this country."

But negligence and unseaworthiness of the carrying vessel might generally, by British law, be excepted by express words; in such a case, though the exception of perils of the sea (to take an instance) might not *per se* for the reasons stated on the facts, avail the carrier, yet he could rely on the exception of negligence or of unseaworthiness as the case might be, when negligence or unseaworthiness had caused or contributed to the loss. One important object of the Acts under consideration was to limit the use of these general exceptive clauses.

The Canadian Act can now be considered, so far as material, in the light of these simple rules, simple in themselves, though in application involving many difficult refinements. Section 4 consists of prohibitions; the section recognises and enforces the fundamental obligations which have just been explained, and then goes on to enact that any clause, covenant or agreement which weakens or relieves against them is illegal and void unless it is in accordance with the other provisions of the Act.

It is, for present purposes, in sections 6 and 7 that these provisions are to be found.

Section 6 deals with the question of negligence and latent defect: it is limited so far as concerns negligence to " faults or errors in navigation or management of the ship ": the meaning of these words (or of analogous words) in the Carriage of Goods by Sea Act, 1924, was discussed in *Gosse Millerd, Ltd.*, v. *Canadian Government Merchant Marine* [1929], A.C. 223, where they were held not to be wide enough to cover matters involving simply a failure to take care of the cargo. What is important to note in section 6 is that the protection is conditional on the owner having exercised due diligence to make the ship seaworthy. At common law, seaworthiness of the ship in a contract for sea carriage has, if necessary, to be shown to have existed at the commencement of the voyage, but unseaworthiness involves no liability on the shipowner unless it has caused the damage complained of (*Kish* v. *Taylor* [1912], A.C. 604); but the obligation to provide a seaworthy ship is absolute, and is not limited to due

diligence to make it so. The matter which section 6 deals with as the condition on which its privileges may be relied on is not seaworthiness, but due diligence to make the ship seaworthy: if, however, that condition is not fulfilled, the shipowner cannot, under section 6, excuse himself from liability for loss due to negligence in the respects specified in the section. What is meant in the British Sea Carriage of Goods Act by due diligence to make the ship seaworthy was discussed in *Angliss* v. *P. & O. S.N. Co.* [1927] 2 K.B. 456; it is not limited to personal diligence on the part of the owner. The Act does not in terms say that there shall not be implied in any contract of sea carriage the absolute undertaking to provide a seaworthy ship, but it would, for practical purposes, seem to effect the same result, subject to the condition by the last words of the section "or from latent defect." The view that the whole section is subject to the condition of due diligence to make the vessel fit is supported by *McFadden* v. *Blue Star Line* [1905], 1 K.B. 697, and by the case in the Supreme Court of the United States, the *Carib Prince* 170 U.S. 665, which dealt with analogous provisions in the Harter Act.

It follows that on this construction of the section the findings of fact of Bond, J. would entitle the appellants to succeed, as indeed the Judge held. It is true that though he finds the ship was seaworthy, he does not seem expressly to find that the owners had exercised due diligence to make her so, which is the essential finding under the section, and theoretically might be a different matter: but no doubt that finding was implied. The fault or neglect he finds to have caused the loss was a fault in navigation.

But apart from the case of latent defect, section 6 has said nothing about unseaworthiness causing the loss, nor does it cover any case of negligence not falling within its precise and limited terms. It is then to section 7 that resort must be had in order to determine the legal effect of the findings of fact of the Courts below, that is that the cargo was lost owing to the ship being unseaworthy. Even if the Court do not find whether or not due diligence was exercised to make her seaworthy, that finding is clearly implied: the bad stowage, on its face, must have involved the fault or neglect of the owners or of their responsible servants or agents. There is no question of latent defect.

The words of section 7 which are material to this case are:— "the ship, the owner, charterer, agent or master, shall not be held liable for loss arising from fire, ~~damages~~ dangers of the seas or other navigable waters, acts of God or public enemies . . . or for loss arising without their actual fault or privity or without the fault or neglect of their agents, servants or employees": Their Lordships disregard the intervening words which deal with matters such as inherent vice of the goods or delays or deviation, the last-named exception being somewhat difficult to construe.

The first words of the section contain a limited number of specific perils which are thus sanctioned by the Act. It is, however, clear that these exceptions will not *per se* protect the shipowner in respect of a loss caused by negligence or by unseaworthiness, and up to this point the shipowner will not be relieved from liability, unless the negligence is excused by section 6 or the unseaworthiness is a latent defect also within section 6. These exceptions do not cover the whole scope of the general obligations of the carrier, at common law or as set out in section 4. Thus, in the present case, the stranding was plainly a peril or danger of the sea, and in that sense the loss of the cargo was due to a danger of the sea. But it was also caused by unseaworthiness, of such a character that it could not be described as a latent defect. On the principles already stated, the statutory exception of dangers of the sea does not in this case relieve the shipowner from liability: if he is to escape liability he can only find protection in the final sentence of section 7, which must next be construed.

In form the sentence is purely negative: " the owners, etc., are not to be liable for loss arising without the actual fault or privity, or without, etc." It is clear that the second " or " here must be read as " and ": this was so held in *Gosse Millerd's* case by the trial Judge at [1927] 2 K.B., p. 435, a ruling not questioned in the House of Lords (*supra*). To avoid liability, the fault or neglect must not be that of either the shipowner or of any of the responsible persons who are enumerated. The negative form is appropriate because the words are intended to exclude what would otherwise be a liability for the loss. It may be questioned whether the shipowner can invoke these general words, unless the case is first brought within the specific exceptions set out in the earlier part of the section, and thereupon issues of negligence or unseaworthiness have fallen to be dealt with: it is not here necessary to decide this question, though the mode in which the analogous case of contractual exceptions has been dealt with, seems to suggest that the question should be answered in the affirmative (see Lord Macnaghten in the *Xantho*, 12 App. Cas. 503, at p. 515). If these general words were to be read irrespective of the particular exceptions which precede them in the section, it is difficult to see why these particular exceptions are stated at all: the general words would suffice to cover by themselves, every case in which the shipowner could claim exemption from liability under section 7 for any loss due to the excepted perils.

What then is the precise effect of these words? The phrase " actual fault or privity " seems to be taken from section 502 of the Merchant Shipping Act, 1894, which relates to " fire." It has been held under that section that if the shipowner proves absence of actual fault or privity, he is exempted from loss, even

if due to unseaworthiness, *Lennards Co.* v. *Asiatic Co.* [1915] A.C. 705 : that decision was applied in the construction of the same words in section 7 by this Board in *Royal Exchange Assurance Corporation* v. *Kingsley Co.* (*supra*), where the loss was by fire : as the fire was the result of unseaworthiness, the shipowners, not having established absence of actual fault or privity, were held to be liable. The meaning of the words was thus explained by Hamilton, L.J. (as he then was) in *Lennard's* case at [1914] 1 K.B. 419, p. 436 :—" actual fault negatives that liability which arises solely under the rule of respondeat superior." But as a matter of grammar the word " their " in section 7 relates back to the enumeration of persons at the beginning of the section and thus includes the actual fault or privity of the owner, charterer, agent or master, which is a much wider category than that under section 502 of the Merchant Shipping Act : this may raise a question in the case of a loss by fire whether section 7 does not in this respect, and also by its reference next following to agents, servants and employees, put a heavier burden on the shipowner than section 502 of the Merchant Shipping Act, so as to be *pro tanto* inconsistent with that section. No such question, however, arises in this case. The general exception at the end of section 7 is obviously not limited to unseaworthiness, but goes to all cases apart from those covered in section 6, in which due care on the part of the enumerated persons is material to the due performance of the contract.

Now the general words go beyond the category of owner, etc., and deal with " the fault or neglect of their agents, servants or employees." But as regards unseaworthiness since the words " actual fault or privity " on the authorities quoted are to be construed as applying even to unseaworthiness, it seems that the words which follow must also receive the same effect, with the result that if, but only if, the shipowner is able to exclude the actual fault or privity or the fault or neglect of the various persons enumerated, he will be able to relieve himself from liability for loss due, among other things, even to unseaworthiness, though the extent of that relief may be limited to cases where the loss is caused also by some one of the excepted perils specified in the earlier part of the section. The operative obligation to provide a seaworthy ship is thus under the Act reduced, even when unseaworthiness causes the loss, to an obligation which may be compendiously described as an obligation to use due diligence to make the ship seaworthy.

In the present case, it is clear that the ship was, according to the findings of the Courts below, not merely unseaworthy but unseaworthy in such a way as necessarily to involve some fault or failure within the final words of section 7. Such a finding, if not express, is obviously to be implied. Hence the appellants

cannot avail themselves of the exception of dangers of the seas, though these dangers caused the loss, because they cannot show that in respect of the unseaworthiness which was also a cause of the loss, and indeed the real cause of the loss, that it existed under conditions entitling them to the benefit of the general words of exception at the end of the section.

The appeal in their Lordships' judgment should be dismissed with costs.

They will humbly so advise His Majesty.

In the Privy Council.

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