Privy Council Appeal No. 79 of 1924.

The Great Lakes Steamship Company - - - - *Appellants*

v.

The Maple Leaf Milling Company, Limited - - - - *Respondents*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH OCTOBER, 1924.

Present at the Hearing;

VISCOUNT CAVE.
LORD DUNEDIN.
LORD CARSON.
LORD BLANESBURGH.
MR. JUSTICE DUFF.

[*Delivered by* LORD CARSON.]

The appellants are a Steamship Company, having their operating office at Cleveland, Ohio, United States of America, and are the owners of the "John Dunn, Jr.," a freight vessel sailing on the Great Lakes lying between Canada and the United States. The respondents are one of the largest Milling Companies in Canada, and were the owners at Port Colborne, which is situated at the easterly end of Lake Erie, of an elevator and flour mill.

In the year 1918, under the provisions of certain war measures having for their object the mobilisation of tonnage on the Great Lakes to facilitate and expedite the transportation of grain from Western Canada to the seaboard for export purposes, the Winnipeg Chartering Committee was established by the owners of vessels and the shippers of grain, and this Committee controlled the allotment to shippers of all tonnage sailing from the Canadian ports of Fort William and Port Arthur on Lake Superior. Under similar arrangements like tonnage of the United States Registry

available for the carriage of grain was mobilised and allotted by the United Grain Forwarders Committee, and arrangements were made between these two Committees by which the Winnipeg Chartering Committee would allot the tonnage and issue the charter to the Canadian shipper.

In the month of November, 1918, the respondents requested the Winnipeg Chartering Committee to make an allotment of tonnage to carry grain from Port Arthur and Fort William for winter storage at Port Colborne, where, as already stated, the respondents had an elevator and a flour mill. It is essential to note that the harbour at Port Colborne has, under normal conditions, a depth of approximately 22 feet, but under the influence of an easterly or northerly wind the level of the water in the harbour, particularly in the fall of the year, is sometimes lowered by as much as 3 feet 4 inches ; the harbour bottom is rock and the harbour is owned by His Majesty as represented by the Government of the Dominion of Canada.

In pursuance of the request from the respondents the Winnipeg Chartering Committee applied for permission to send the "John Dunn, Jr." to Port Colborne under a grain charter for winter storage. The appellants, the owners of the said "John Dunn, Jr.," at first refused such permission, having regard to the question of safety owing to the tendency to the lowering of the water level as aforesaid, as the "John Dunn, Jr.," when loaded, had a depth of 20 feet. This is apparent from the telegrams of the 22nd and 23rd November, 1918, passing between the United Grain Forwarders and the Winnipeg Committee. On the 22nd November the Winnipeg Committee sent a telegram in the following terms :—

> "Will take two boats for early December loading Bay Colborne. Won't send anything to Colborne if harbour not safe. You understand all boats at Colborne are lightered on arrival to safe draft."

and on the 23rd November the United Committee wired to the Winnipeg Committee as follows :—

> "Mr. Ayres" (the manager of the appellants) "says he is willing to give you Colborne option on Dunn, Norway and Durston . . . . . it is also to be understood in event you send these vessels to Colborne, that they are to be lightered on arrival to fifteen feet draft."

Eventually terms were agreed upon with the representative of the appellants, and a charter was granted by the Winnipeg Chartering Committee to the respondents on the 28th November, 1918, in the words and figures following, that is to say :—

"Winnipeg, Man., 28th November, 1918.

"Gentlemen :—

"S.S. 'JOHN DUNN, JR.'

> "This confirms to you charter of the steamer 'John Dunn, Jr.,' for a full and complete load of wheat at Fort William—Port Arthur, Ont., about the 30th November, 1918, for a storage load to Port Colborne The rate of freight from Fort William to Port Colborne, to be six cents (6 c.) per bushel of wheat, payable in American exchange.

"It is your option to store grain in this vessel until the 1st April, 1919, if desired, but not later than this date.

"Five and one-half cents (5½ c.) per bushel of wheat is to be paid upon the arrival of the vessel at Port Colborne, on the complete cargo as loaded, and the balance, namely, one-half cent. (½ c.) per bushel to be paid when the cargo is finally unloaded. On arrival of the steamer at destination, it is to be lightered to a safe winter draft. The freight on the lightered quantity to be the same as the winter storage rate. The unloading and elevating charges on the entire cargo, as loaded, to be at the regular summer tariff rate.

"It is understood that you are to pay all expenses in connection with ice work and moving of the boat while she is at Fort William—Port Arthur, also that you are to pay any ice-cutting charges and other expenses in connection with moving the boat while she is in the port of Port Colborne. On arrival of the vessel at Port Colborne, she is to proceed to the elevator immediately to lighter, and then proceed at once to her winter berth.

"It is understood that we will cover the Marine, Outturn and Storage insurance.

"Yours truly,

"WINNIPEG CHARTERING COMMITTEE,

"Per 'A. E. SPENDLOVE.'

"To :—

"The Maple Leaf Milling Co., Ltd., Building.

"AES/ES."

There was some argument before the Board that this document did not constitute a contract between the appellants and the respondents, but as no answer was given or any objection made to the terms by the respondents, and as it was upon the terms of such contract that the appellants supplied the "John Dunn, Jr.," there can be no doubt that this letter constitutes the contract entered into between the parties.

The vessel was loaded with 367,890·40 bushels of wheat at Port Arthur and Fort William and proceeded on her voyage, clearing from Port Arthur on the 2nd December, 1918, and arriving in the harbour of Port Colborne on Friday, the 6th December, at 12.15 p.m. Upon her arrival the master of the "John Dunn, Jr." found that the berth alongside the respondents' elevator, to which under the charter she was to proceed, was occupied by a vessel called the "Riverton," and the "John Dunn, Jr." therefore drew up beside her. The master was told that the "John Dunn, Jr." must await her turn and could not be lightered until the "Riverton" and another ship called the "Reiss," which was also waiting, had completed their lightering, and, further, that the respondents could not proceed with the lightering of the "John Dunn, Jr." probably for another three or four days as the elevator was full and space had to be made by grinding the wheat into flour, whereupon the master of the "John Dunn, Jr." under protest moved his vessel over beside the Government Dock to wait until the respondents would be ready to lighter her. She was then drawing about 20 feet.

On Monday, the 9th December, the "John Dunn, Jr." took up her position in the berth beside the respondents' elevator, the "Riverton" and the "Reiss" having been got out of the

way, and the master reported to the respondents' superintendent that his vessel was in position to be lightered. The superintendent, however, replied that the respondents could not lighter her before the following Thursday, although the respondents might be able to take some grain out of the vessel on Wednesday. The master then inquired if the vessel would be safe where she lay in the berth in front of the elevator in the event of the water lowering, or would it be necessary for him to get her off to protect himself. The answer of the respondents' superintendent was " This harbour was all drilled, blasted and chiselled before this or the Government elevator sank a crib, and your ship is just as safe lying alongside the wharf as she would be if she could get into my office on this floor providing you do not attempt to move her." In consequence of this assurance the master of the " John Dunn, Jr." left his ship moored at the respondents' wharf.

Upon returning to the ship at 11.30 on that same evening he found that by reason of the lowering of the water the ship, not having been lightered even in part, had settled upon the bottom. It was subsequently ascertained that in settling down she had rested upon a large anchor, the thickest part of which stood 2 feet above the floor of the harbour. By reason thereof the ship had sustained very serious injuries to her hull, and she was leaking and had listed outboard—that is to starboard—and the total amount of damages sustained by the appellants was alleged to be the sum of $40,516.68, which is the sum claimed in this action by the appellants from the respondents. The fact that this anchor was lying upon the bottom was admittedly unknown to anyone. It had apparently been dropped by some other vessel which had occupied the berth.

It is necessary to note that the dock at Port Colborne, which belonged to His Majesty the King in the right of the Dominion of Canada, was leased to the respondents for twenty-one years from the 1st May, 1909, the said lease being renewable at the end of each succeeding term of twenty-one years, and there was excepted from the said lease a strip 12 feet in width along the face of the west, south and east sides of the said dock, which was open to the use of the public jointly with the respondents. The elevator which was erected by the respondents was equipped, amongst other things, with a " leg " which stretches across this 12 feet strip to the hold of vessels placed alongside the dock for the purpose of conveying the contents of the vessels to the elevator.

The case was tried before Mr. Justice Middleton in the Supreme Court of Ontario, who, by his judgment on the 19th April, 1922, decided in the appellants' favour, holding that it was the duty of the respondents to make sure that the condition of the harbour at the place of unloading was safe for that purpose and that having invited those in charge of the vessel to station it where it was when it met with the injury, the respondents warranted that that place was a safe one in which to lie

pending the discharge of the cargo and that the law applicable to the case was determined in the appellants' favour by the decisions of the "*Moorcock*," 14 P.D., page 64, and the "*Bearn*" [1906] P, page 48. From this decision the defendants (the present respondents) appealed to the Appellate Division, who, on the 11th June, 1923, reversed the decision of Mr. Justice Middleton, Hodgins J.A. dissenting. The majority in the Court of Appeal attempted to distinguish the cases relied upon by the Trial Judge, holding that there was no such duty cast upon the respondents as had been found by the Trial Judge. They also held that in the question of breach of contract "to lighter immediately," the damage was too remote to be recoverable. Hodgins J.A., however, held in favour of the appellants on both points. Their Lordships cannot agree with the judgment arrived at by the majority in the Appellate Court. Their Lordships are of opinion that the document already referred to of the 28th November, 1918, must be held to be the contract upon which the appellants agreed to charter their vessel, the "John Dunn, Jr.," to the respondents. This contract specially provided that "on arrival of the steamer at destination it is to be lightered to a safe winter draft," and also that "on arrival of the vessel at Port Colborne she is to proceed to the elevator immediately to lighter and then proceed at once to her winter berth." The actual berth to which the "John Dunn, Jr." was to go on arrival was designated, namely, the dock in which the appellants' elevator stood, and consequently she went there as soon as she could.

Upon the facts already stated not only did the respondents fail to proceed with the lightering of the vessel upon her arrival, but she was delayed from the 6th December to the 9th December, not because other vessels were there before her but because the respondents' elevator was so full that they could only take out each day an equivalent to what they could grind up, say, 40,000 bushels a day, and, as stated by Hodgins J.A., this was continued from the 6th and throughout the 9th December, so that both the delay in bringing the vessel to the elevator and in lightering her when there, was directly due to the appellants, in that their elevator capacity was so occupied with grain from other vessels that they could not and did not unload the "John Dunn, Jr." immediately on her arrival in port or on her reaching the designated dock.

There can be no doubt that it was from breach of the contract immediately to lighter that the vessel grounded by reason of the lowering of the water, the very thing which it was anticipated might occur and which rendered the immediate lightering so important, and it must, in their Lordships' opinion, be held that it was the breach of contract in not lightering the vessel which was the immediate cause of the damage, and the fact that such damage might not have occurred if the anchor had not been sunk, can make no difference. If grounding takes place in breach of contract, the precise nature of the damage incurred by grounding is immaterial.

There was some argument before their Lordships on behalf of the respondents that the words in the contract "on arrival of the steamer at destination it is to be lightered to a safe winter draft" or the other words "on arrival of the vessel at Port Colborne she is to proceed to the elevator immediately to lighter," did not contemplate in the minds of the contracting parties anything more than a contract to unload within a reasonable time having regard to the exigencies of the previous engagements and the normal carrying on of the business. Their Lordships cannot agree with this construction of the contract, where the words are clear and explicit and where the very objects for which these words were inserted were likely to be frustrated if any such delay as was contended for as reasonable in the present case was to be held justified.

Having come to this conclusion upon the contract and the subsequent facts, their Lordships do not think it essential to examine the case from the point of view upon which it was decided by the learned Trial Judge, but their Lordships must not be taken as holding that they dissent in any wise from the views of the learned Trial Judge or that they desire to throw any doubt upon the soundness or the applicability of the decision in the "*Moorcock*" case.

Their Lordships are therefore of opinion that the appeal should be allowed and that the order of Mr. Justice Middleton of the 19th April, 1922, should be restored and that the appellants should have the costs here and below, and they will humbly advise His Majesty accordingly.

In the Privy Council.

THE GREAT LAKES STEAMSHIP COMPANY

v.

THE MAPLE LEAF MILLING COMPANY, LIMITED.

DELIVERED BY LORD CARSON.

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