Privy Council Appeal No. 13 *of* 1958

Maxine Footwear Company Limited and another - - - *Appellants*

v.

Canadian Government Merchant Marine Limited - - - *Respondent*

FROM

THE SUPREME COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND JUNE, 1959

Present at the Hearing:

THE LORD CHANCELLOR
LORD REID
LORD TUCKER
LORD SOMERVELL OF HARROW
LORD DENNING

[*Delivered by* LORD SOMERVELL OF HARROW]

This is an appeal from a judgment of the Supreme Court of Canada (Kerwin, C.J., Taschereau, Fauteux and Abbott, J.J., Cartwright, J., dissenting) dated 1st October, 1957, dismissing an appeal from a judgment of the Exchequer Court of Canada (Cameron, J.) which in turn had dismissed an appeal from a judgment of the Admiralty Court for the District of Quebec (Arthur I. Smith, J.) whereby the appellants' action as shippers against the respondents as carriers for non-delivery of their goods was dismissed.

The first named appellants were shippers and the second named appellants consignees of cargo loaded on board the M.V. "Maurienne" (hereinafter called the ship) at Halifax, N.S., in February, 1942, to be carried to Kingston, Jamaica. The cargo and ship were destroyed by fire before she left Halifax. The second named appellants have assigned their rights to the first named appellants.

The registered owner of the ship was His Late Majesty King George VI represented by the Honourable the Minister of Transport of the Dominion of Canada. The respondent originally submitted that the contract of carriage on which the appellants rely was with the Crown and not with the respondents. This point failed in all Courts below and was not taken before their Lordships.

The contract of carriage was subject to the Canadian Water Carriage of Goods Act, 1936. The following provisions of that Act are material.

Article III.

RESPONSIBILITIES AND LIABILITIES.

1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to,

(*a*) make the ship seaworthy ;

(*b*) properly man, equip, and supply the ship ;

(*c*) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

Article IV.

RIGHTS AND IMMUNITIES.

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III.

Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from,

(*a*) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship ;

(*b*) fire, unless caused by the actual fault or privity of the carrier ;

(*c*) perils, danger, and accidents of the sea or other navigable waters ;

(*d*) act of God ;

(*e*) act of war ;

(*f*) act of public enemies ;

(*g*) arrest or restraint of princes, rulers or people, or seizure under legal process ;

(*h*) quarantine restrictions ;

(*i*) act or omission of the shipper or owner of the goods, his agent or representative ;

(*j*) strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general ;

(*k*) riots and civil commotions ;

(*l*) saving or attempting to save life or property at sea ;

(*m*) wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods ;

(*n*) insufficiency of packing ;

(*o*) insufficiency or inadequacy of marks ;

(*p*) latent defects not discoverable by due diligence ;

(*q*) any other cause arising without the actual fault and privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

3. The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.

The cargo consisted of three wooden crates and one drum of shoe leather and shoe findings. It was delivered to Canadian National Railways in Montreal on or about the 26th January, 1942. Canadian National

Railways issued a through Bill of Lading which contained a Clause Paramount stating that the Bill of Lading had effect subject to the provision of the Water Carriage of Goods Act. The Bill of Lading being subject to the Act such a clause had to be inserted under section 4 of the Act.

The ship arrived at Halifax on Saturday, 31st January. It has been common ground that the appellants' cargo was loaded in No. 3 hold. The loading of this hold probably began on Tuesday, 3rd February, and finished on Friday, 6th. In the view which their Lordships take the precise times do not matter. The loading of all cargo was completed at about 8.15 on Friday evening. The intention was to sail on Saturday.

On the morning of Friday it was found that three scupper pipes passing through No. 3 hold and discharging from the bath, toilet and galley sink were blocked by ice at the point at which they met the ship's side. The Master instructed one of the officers to have these pipes thawed out. This work was done between 3 and 4 p.m. on Friday afternoon by an employee of a Halifax firm, Purdy Bros., who used an acetylene torch.

There was cork insulation round the pipes. The heat of the acetylene torch acting on the cork started a fire. This was detected at about 11.30 p.m. In spite of efforts to extinguish the fire, it spread and at about 5.30 a.m. on Saturday, 7th February, the Master was forced to order the scuttling of the ship which resulted in the loss inter alia of the appellants' cargo.

It was found by the learned trial judge and admitted before their Lordships that the officer who ordered and supervised the thawing was negligent. The cork insulation created a danger of fire and the man operating the torch should have been warned or some other method used.

On the pleadings the appellants claimed for their goods; the respondents relied on the immunities under Article IV, Rule 1 and Rule 2 (*a*) and (*b*). They further submitted that they had performed their obligations under Article III, Rule 1. The appellants submitted that the respondents had not exercised due diligence to make the ship seaworthy within Article III, Rule 1; that the unseaworthiness so resulting caused the damage; and that in these circumstances the respondents could not rely on the immunities under Article IV.

The District Judge in Admiralty found that the fire was due to the heat generated by the acetylene torch and this is not now disputed. It had been contended by the appellants that the presence of ice made the ship unseaworthy. This was rejected by the learned Judge and this finding is not now disputed.

The learned Judge held that the warranty of seaworthiness was not a continuing warranty. He held that on the evidence the appellants' cargo had been loaded before the attempt to thaw the ice had begun and that the ship was seaworthy at the "loading stage". He further held that the question of seaworthiness for the voyage never arose as the ship never sailed. In these circumstances the respondents were entitled to rely on Article IV.

One of the questions for decision in this appeal is whether the qualified obligation under Article III, Rule 1, applies only at stages or is a continuing obligation from at any rate the beginning of the loading down to the beginning of the voyage.

The Exchequer Court on appeal held that the fourth officer and possibly the Captain and Chief Engineer were negligent in relation to the use of the acetylene torch. Cameron, J., held that the presence of ice did not make the ship unseaworthy. He went on to consider whether "in the negligent use and application of the acetylene torch, the respondent failed before and at the beginning of the voyage to make the vessel seaworthy and the holds and all other parts of the vessel in which goods were carried fit and safe for their reception, carriage and preservation as required by Rule 1 of Article III". If the respondent had not so failed it would be entitled to immunity under Article IV.

The learned Judge held that the obligations under Article III had been fully carried out before the thawing out operations started. He further held that on this basis the fire arose from negligence in the management of the ship. The respondent was therefore entitled to the benefit of Rule 2 (*a*) of Article IV. The Court considered various authorities on what constituted management. It was further held that the respondent could rely on Rule 2 (*b*) in that the negligence of the respondents' servants did not constitute actual fault or privity of the carrier.

In the Supreme Court the majority held that on the evidence the appellants' goods were not stowed until after the commencement of the fire. On the assumption that a plaintiff can only rely on unseaworthiness at the commencement of the loading and that for this purpose the commencement of the loading means the commencement of the loading of each shippers parcel and not the commencement of loading any cargo the appellants had therefore established a breach of Article III subject to due diligence. The Supreme Court held that the respondent had established due diligence. This was on the basis that due diligence need only be exercised by the owners personally or those who act for the owners in a managerial capacity, that is a class similarly restricted to that to which fault or privity has to be brought home under the fire clause. There was no evidence that members of that restricted class knew that the pipes were frozen or that an acetylene torch was to be used.

Cartwright, J., dissenting agreed with the finding that the appellants' goods were not stowed until after the commencement of the fire. He held that an owner only escapes liability for damage caused by unseaworthiness if due diligence has been exercised not only by himself but by his experts, servants or agents. He further held that this failure to exercise due diligence caused the fire which amounted to unseaworthiness and caused the loss. He would have entered judgment for the appellants.

The question as to the scope of due diligence was dealt with by this Board in *Paterson Steamships Ltd.* v. *Robin Hood Mills, Ltd.*, 58 Ll L. Rep. 33, at p. 40. "The condition"—that is of the exercise of due diligence to make a vessel seaworthy—"is not fulfilled merely because the shipowner is personally diligent. The condition requires that diligence shall in fact have been exercised by the shipowner and those whom he employs for the purpose—see *Dobell* v. *Steamship Rossmore Company* [1895] 2 Q.B. 408."

The failure to exercise due diligence by the fourth officer was therefore, if the matter becomes relevant, a failure to exercise due diligence by the carrier within Article III, Rule 1. On this point their Lordships agree with Cartwright, J.

Before proceeding to consider the arguments it is convenient to state certain conclusions which appear plain to their Lordships.

From the time when the ship caught on fire she was unseaworthy.

This unseaworthiness caused the damage to and loss of the appellants' goods.

The negligence of the respondent's servants which caused the fire was a failure to exercise due diligence.

Logically the first submission on behalf of the respondent was that in cases of fire Article III never comes into operation even though the fire makes the ship unseaworthy. All fires and all damage from fire on this argument fall to be dealt with under Article IV (2) (*b*). If this were right there was at any rate a very strong case for saying that there was no fault or privity of the carrier within that rule, and the respondent would succeed.

In their Lordships' opinion the point fails. Article III, Rule 1, is an overriding obligation. If it is not fulfilled and the non-fulfilment causes the damage the immunities of Article IV cannot be relied on. This is the natural construction apart from the opening words of Article III, Rule 2. The fact that that Rule is made subject to the provisions of Article IV and Rule 1 is not so conditioned makes the point clear beyond argument.

The further submissions by the respondent were based as they had to be on the construction of Article III, Rule 1. It was submitted that under that Article the obligation is only to exercise due diligence to make the ship seaworthy at two moments of time, the beginning of the loading and the beginning of the voyage.

It is difficult to believe that this construction of the word " before " could have been argued but for the fact that this doctrine of stages had been laid down in relation to the absolute warranty of seaworthiness in English law.

It is worth, therefore, bearing in mind words used by Lord Macmillan with reference to the English Carriage of Goods by Sea Act, 1924, which embodied the Hague rules as does the present Act. " It is important to remember that the Act of 1924 was the outcome of an International Conference and that the rules in the Schedule have an international currency. As these rules must come under the consideration of foreign Courts it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptation ". (*Stag Line* v. *Foscolo Mango & Co.* [1932] A.C. 328 at p. 350.)

In their Lordships' opinion " before and at the beginning of the voyage " means the period from at least the beginning of the loading until the vessel starts on her voyage. The word " before " cannot in their opinion be read as meaning " at the commencement of the loading ". If this had been intended it would have been said. The question when precisely the period begins does not arise in this case hence the insertion above of the words " at least ".

On that view the obligation to exercise due diligence to make the ship seaworthy continued over the whole of the period from the beginning of loading until the ship sank. There was a failure to exercise due diligence during that period. As a result the ship became unseaworthy and this unseaworthiness caused the damage to and loss of the appellants' goods. The appellants are therefore entitled to succeed.

It becomes therefore unnecessary to consider whether the Supreme Court were justified in holding that the appellants' goods were not stowed until after the commencement of the fire.

It is also unnecessary to consider the earlier cases as to " stages " under the common law. The doctrine of stages had its anomalies and some important matters were never elucidated by authority. When the warranty was absolute it seems at any rate intelligible to restrict it to certain points of time. It would be surprising if a duty to exercise due diligence ceased as soon as loading began only to reappear later shortly before the beginning of the voyage.

For these reasons their Lordships will humbly advise Her Majesty that this appeal should be allowed and judgment entered for the appellants for $2,801.33.

The respondent must pay the appellants' costs of this appeal and in the Courts in Canada.

(39827) Wt. 8078—37 100 7/59 D.L.

In the Privy Council

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AND ANOTHER

v.

CANADIAN GOVERNMENT MERCHANT
MARINE LIMITED

DELIVERED BY LORD SOMERVELL OF
HARROW

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