1958

DEEP SEA TANKERS LIMITED AND SHELL OIL COMPANY (*Plaintiffs*) ..... APPELLANTS;

*Mar. 19, 20
Jun. 26

AND

THE SHIP "TRICAPE" AND HER OWNERS, TRITON STEAMSHIP COMPANY LTD. (*Defendants*) .. RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Shipping—Damages following collision—Loss of hire—Special terms in charterparty.

A charterparty covering several ships provided in cl. 5 that if any vessel covered by it was "laid up or delayed for any period on account of circumstances beyond the control of Owner and its agents" the charterer should continue to be liable for hire, but the owner, out of any sums received "as hire, compensation, indemnity, damages or otherwise", would reimburse the charterer for all sums paid as hire for the period.

One of the vessels covered by the charterparty was involved in a collision with another ship, which was found wholly to blame for the collision.

Held: The damages to which the owner of the damaged ship was entitled should include damages for loss of use of the ship while in detention for repairs. The inference to be drawn from cl. 5 of the charterparty was that as between the parties hire was deemed to cease to be payable, or to be repayable in case of prepayment, to the extent that the owner might recover against the wrongdoer. In these circumstances, the owner had a provable loss against the wrongdoer. *The "Mergus"* (1947), 81 Lloyd, L.R. 91, referred to. The fact that payment had actually been made in this case could make no difference; the governing factor was liability to repay in the events that had happened. What the owner had, by virtue of cl. 5, was a complete indemnity against loss of hire. The loss was initially paid by the charterer subject to the right of reimbursement. *Chargeurs Réunis Compagnie Française de Navigation à Vapeur et al. ("Ceylan") v. English & American Shipping Company ("Merida")* (1921), 9 Lloyd, L.R. 464 at 466, distinguished.

APPEAL from a judgment of A. I. Smith D.J.A.[1], delivered following a reference to assess damages. Appeal allowed.

Jean Brisset, Q.C., and *L. Lalande, Q.C.*, for the plaintiffs, appellants.

*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright and Judson JJ.

[1] [1956] Ex. C.R. 221.

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C. Russell McKenzie, Q.C., for the defendants, respondents.

THE CHIEF JUSTICE:—At the opening of the hearing we considered a preliminary objection that there was no jurisdiction to hear the appeal on the ground that this was an attempt to appeal directly to this Court against a report of a referee. The original trial of the question of liability was held before Mr. Justice A. I. Smith, District Judge in Admiralty, and his finding that the "Tricape" was wholly to blame for the collision which caused the damage complained of was affirmed by this Court. Thereafter, on April 21, 1955, the judge made an order referring the assessment of damages to the District Registrar, but, instead, the parties proceeded with the assessment of damages before the judge himself. Under those circumstances we decided that what had happened should be treated as a continuation by consent of the original trial of the action before the same judge. What was appealed against therefore was a judgment and the hearing proceeded.

For the reasons given by Mr. Justice Judson the appeal should be disposed of as indicated by him.

The judgment of Taschereau, Locke, Cartwright and Judson JJ. was delivered by

JUDSON J.:—The appellant Deep Sea Tankers Limited is a subsidiary company of the appellant Shell Oil Company and the owner of the tanker "Paloma Hills", which is under a long term time-charter to the parent company. The "Paloma Hills" was involved in a collision with the "Tricape" off the coast of Venezuela on March 21, 1948. The "Tricape" was found by A. I. Smith J., District Judge in Admiralty, wholly to blame for the collision and that finding was affirmed by this Court on April 28, 1953[1]. The judgment directed a reference to assess the damages and this is an appeal from what we held on the argument of the present appeal to have been a continuation before A. I. Smith D.J.A. of the original trial. Shortly before the commencement of that continuation the Shell Oil Company, the time-charterer, was joined as an additional plaintiff.

The only item of damages allowed by the learned trial judge[2] was for physical damage to the ship in the sum of $19,243.77, plus interest at the rate of 5 per cent. per

[1] [1953] 2 S.C.R. at p. viii. [2] [1956] Ex. C.R. 221.

annum, calculated in respect of various items which make up the sum of $17,192.22 shown in statement "B" from the dates upon which the said items respectively were paid, and on the sum of $2,051.55 from July 1, 1948. He allowed nothing on a claim of approximately $40,000 for loss of use of the ship while in detention for repairs for a period of 19 days. He rejected the charterer's claim for such loss because, under certain authorities, a time-charterer has no cause of action for loss of use of the ship, even though it is obligated by its contract to pay the owner during the period of detention. He rejected the owner's claim because it could prove no loss, the hire having been paid pursuant to contract by the time-charterer. And finally, he held that cl. 5 of the charterparty, to be set out in full and considered later, did not affect the question of the right to recover by either charterer or owner.

Without expressing any view as to the soundness of the authorities in pursuance of which the learned trial judge rejected the charterer's claim, I turn to a consideration of the owner's claim and of cl. 5 of the charterparty (covering several ships), which reads:

> 5. 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, Charterer shall nevertheless continue to be liable to Owner for "Owner's Hire" as defined in paragraph 3(b) hereof during such period. Out of, and to the extent of, any 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.

Why did the parties contract in this particular way, providing first for a continuing liability to pay hire and then for a right of reimbursement? They were doubtless attempting to avoid the application of the authorities relied on by the trial judge. A simple cesser-of-hire clause, a common enough provision (30 Halsbury, 2nd ed. 1938, 310-1) would not have served their purpose because it would not have been accepted by those responsible for financing the construction of these ships. It is necessary to

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provide that, whatever may happen, the hire will be available from some source to retire the indebtedness incurred for construction. For this reason the clause begins with an obligation on the charterer to pay hire during the period of detention arising from the stated causes. Then, confining the operation of the clause to the actual case now before the Court, to the extent of any recovery from the wrongdoer, the owner must reimburse the charterer. Does this bring about a qualification of the obligation to pay hire? The inference to be drawn from the arrangement and form of the clause is that as between the parties hire is deemed to cease to be payable, or to be repayable in case of prepayment, to the extent that the owner may recover against the wrongdoer.

Does this enable an owner to answer the defence that he has been paid and that he has no provable loss? He is obviously under a contractual obligation to pay over to the charterer detention damages to the extent that hire has been received during the period of detention. Whatever may be the outcome of the litigation, the owner is assured of the hire or its equivalent, but as between owner and charterer and in case of a claim against a third party, hire is deemed to cease to be payable to the extent of the owner's right of recovery against the wrongdoer. In these circumstances, the owner has a provable loss against the wrongdoer. This was also the opinion of Willmer J. in *The "Mergus"*[1], where there was a similar clause under consideration, not, it is true, precisely in the same terms but in terms so like in effect that I cannot draw any distinction between the two. The fact that payment has actually been made in this case can make no difference. The governing factor is liability to repay in the events that have happened.

Another way of stating the result is this. By the use of cl. 5 owner and charterer have made their contract one of indemnity in relation to the payment of hire. What the owner has by virtue of this clause is a complete indemnity against loss of hire. The loss is initially paid by the charterer subject to a right of reimbursement in certain events. This is a very different situation from the one commented upon by Bankes L.J. in *Chargeurs Réunis Compagnie Française de Navigation à Vapeur et al. ("Ceylan") v. English & American Shipping Company ("Merida")*[2]. In

[1] (1947), 81 Lloyd, L.R. 91.

[2] (1921), 9 Lloyd, L.R. 464 at 466.

that case one finds nothing beyond an obligation to pay hire at an agreed rate for the period of detention with which the litigation was concerned. There was no element of indemnity in that contract and the Court so found. In this case, the wrongdoer cannot answer the claim of the owner by pleading that he had been paid by the charterer. It is no concern of the wrongdoer and no answer to the claim against him that the loss has been paid by a third party under a contract of indemnity.

The result is the same whether the case is treated as one of a quantitative or limited cesser of hire or one of indemnity. There is error in the judgment appealed from in the omission to give any effect to cl. 5 and the appeal should be allowed. As to the damages to be awarded for loss of time, three methods of computation were suggested, the first based upon cost of replacement, the second upon the hire actually payable in this case and the third on actual cost of operation of the ship. There is not much difference in the result, but, in the case of a long-term time-charter, the proper method of computation appears to me to be a contractual one, which results in a sum of $39,351.37.

I would allow the appeal with costs and increase the damages by the sum of $39,351.37, which, being added to $19,243.77, makes a total of $58,595.14, for which the appellants are entitled to judgment, together with interest at the rate of 5 per cent. per annum, calculated in respect of various items which make up the sum of $17,192.22 shown in statement "B" from the dates upon which the said items respectively were paid, and on the sum of $2,051.55 from July 1, 1948. They are also entitled to interest at the rate of 5 per cent. per annum on the sum of $39,351.37 from July 1, 1948. In view of the fact that the defendants had insisted upon the production of formal proof in respect of various items comprising the sum of $19,243.77, and considering, on the other hand, that the adding of the Shell Oil Company as a plaintiff was unfounded and useless, the trial judge directed that the costs of the further proceedings before him should be borne equally by the plaintiffs and defendants. He, of course, allowed nothing for loss of use. Bearing in mind the considerations mentioned, but also the

fact that the claim for loss of use is now allowed, it would be fair to award the appellants one-half the costs of the assessment of damages.

Appeal allowed with costs.

Attorneys for the plaintiffs, appellants: Beauregard, Brisset, Reycraft & Lalande, Montreal.

Attorney for the defendants, respondents: C. Russell McKenzie, Montreal.