SALMON RIVER LOGGING COMPANY LIMITED (*Defendant*) ..... } APPELLANT;

1953

*May 20, 21
*Jun 26

AND

CHARLES HARVEY BURT AND JOHN JOSEPH BURT carrying on business under the firm name and style of Burt Bros. and BURT BROS. (*Plaintiffs*) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contract—Hauling of logs—Negligence—Liability—Scope of exemption clause respecting damages to trucks—Whether party exempted from liability for negligence—Whether damage within scope of contract.

The respondent contracted to haul all logs produced by the appellant logging company from the logging area. One of its trucks was damaged while standing in the logging area near to a spar tree of the appellant where it had been placed for loading. This spar tree was used both for yarding logs and for loading them on to the trucks. A log which the appellant was yarding hit and broke a snag with the result that the spar tree fell on the truck.

The respondent's action, claiming negligence, was met by the contention that the appellant's liability was excluded by the exempting clause of the contract which provided that: "The trucks and the personnel operating such trucks shall . . . be at the risk of and the responsibility of the truckers and the truckers will provide their own insurance, pay their own workmen's compensation charges and will indemnify . . . the company from any claims or damages or for any damage that may occur arising out of the use or operation of the said trucks . . .". The action was maintained by the trial judge and by the Court of Appeal for British Columbia. The negligence of the appellant was not contested in this Court.

Held: (Kellock and Locke JJ. dissenting), that the appeal should be dismissed.

Per: Rand J.: On the principle followed in *Canada Steamships Company v. The King* [1952] 1 All E.R. 305, as the exempting clause can be satisfied reasonably by reference to an area not touching the negligence of the company, its language is not to be read as extending to that negligence. Furthermore, the accident arose out of work carried on exclusively by the company and therefore outside the scope of the contract.

Per: Estey and Cartwright JJ.: The reciprocal obligations contracted by the parties had to do with the loading, hauling and dumping of the logs. The operation in the course of which the truck was negligently damaged had nothing to do with the operation of loading the truck; it was therefore not within the four corners of the contract and the exempting clause did not apply. On the assumption that the words

*PRESENT: Rand, Kellock, Estey, Locke and Cartwright JJ.

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of the clause should apply to the negligence of the appellant in matters within the contract, clear words would be necessary to cover damage caused by negligence in an operation carried on outside the contract.

Per: Kellock and Locke JJ. (dissenting): Effect can be given to all of the language of the exempting clause only by construing it as covering damage or injury to trucks or drivers caused by the negligence of the appellant as well as to damage to the person or property of third persons caused by reason of the operation of the trucks. As the damage arose within the scope of the contract, the appellant should be exempted from liability.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), upholding the decision of the trial judge (2) and maintaining the action for damages.

C. K. Guild Q.C. for the appellant.

Alfred Bull Q.C. for the respondent.

RAND J.:—Clause 3 of the agreement, on which the contention of Mr. Guild is based, reads:—

3. IT IS UNDERSTOOD AND AGREED that the trucks and the personnel operating such trucks, shall, at all times during the life of the within contract, be at the risk of and the responsibility of the Truckers and that the Truckers will provide their own insurance, pay their own Workmen's Compensation charges and will indemnify and save harmless the Company from any claims or damage or for any damage that may occur arising out of the use or operation of the said trucks for the term of the within contract.

Construing that language as a whole and with the remaining provisions, I have come to the conclusion that it is designed to evidence conclusively the fact that the trucking was to be taken as separate and distinct from the loading and other work carried on by the Logging Company; that the trucking firm was to act as an independent contractor and not in any relation of agency, partnership, sub-contractor, or anything of like nature toward the Company: that, in short, no risk relating to the property or personnel of the Truckers was to be placed upon the Company attributable to any relationship arising from the contract. This may have been quite unnecessary but the language indicates it to have been in the minds of the parties.

Mr. Guild contends that the clause is aimed at the hazards of the work undertaken so far as it involved co-operative or concurrent action by the Company, and that since outside the obligations of the contract the Company

(1) [1952] 6 W.W.R. (N.S.) 92. (2) [1951-52] 4 W.W.R. (N.S.) 370.

would be liable only for negligence, this latter must be imported to give subject matter to the language. The first significant word is "risk." That may denote risks of damage or injury caused to the trucks or personnel by accident, by the negligence of the Truckers themselves or by third parties, or by that of the Company, and it is so far ambiguous: but on the principle followed by the Judicial Committee in *Canada Steamships Company v. the Crown* (1), as the clause can be satisfied reasonably by reference to an area not touching the negligence of the party claiming the benefit of it, its language is not to be read as extending to that negligence; and that interpretation is confirmed by the considerations which follow. The word "responsibility" is to be related, obviously, to the consequences of conduct of the Truckers. Why should tortious action by the Truckers be declared to be on their own responsibility? Only because of possible effects resulting from the special relations created by the contract. The Truckers are to insure generally. Insurance would cover loss from accident and the negligence of themselves as well as that of third persons; but what of damage caused by the Company? Being of the nature of indemnity, insurance gives rise to subrogation against the wrongdoer: is this subrogation to be negatived in relation to the Company by insuring for its benefit where the damage is the result of its negligence but not so in the case of other wrongdoers? How can we imply such a significant provision? The Truckers will pay their own compensation charges. What could raise a doubt about this? Only that the terms of the contract might seem to create a relationship affecting that obligation by associating in some way the Truckers with the Company in what is, objectively, an entirety of operation. Mr. Guild referred to the provisions of the Act by which where an employee of one class is injured by the negligence of an employee in another class, the latter is charged with the resulting compensation. How the Truckers could, short of bearing the entire award themselves, prevent that transfer from being made under the statute I am unable to see; and what the Truckers are to do is to pay their charges, not compensation to their own employees.

(1) [1952] 1 All E.R. 305.

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This view is strikingly confirmed by the last member of the clause. The Truckers are to "indemnify and save harmless the Company" from the consequences specified. To what consequences are these words appropriate? We do not "indemnify and save harmless" from or against our own claims or for damage done to us by others. To give them that effect would be to interpret them as an anticipatory release or a declaration that no claims would arise or could be made by the Truckers against the Company. But this familiar phrase must be given its well established meaning. To indemnify and save harmless is to protect one person against action in the nature of claims made or proceedings taken against him by a third person, and it would distort that plain meaning to attribute any other signification to it.

Finally, the indemnity is to be for damage "arising out of the use or operations of the said trucks", that is, those operations or use as being the cause of damage or to which it is attributable. This concluding sentence gathers up the effects of the previous language and furnishes protection in law to the substantive matter of the preceding specifications. It completes a consistent and logically developed expression of a specific area of security to the Company and one which, in the circumstances, the parties can readily be understood to have had in mind.

The accident here was not of the nature so envisaged; it arose out of work carried on exclusively by the Company; the fact that the truck was in its vicinity awaiting loading cannot in any sense stamp the resulting damage as arising out of that fact.

There remains to be added what is to me a most pertinent question: in this situation of doubtful meaning of their language, for what conceivable reason can we take the parties to have intended that in relation to these associated operations in which there might easily be joint negligence, and as between themselves, the Truckers were to be liable for their negligence while the Company was to be excused? I can imagine none.

I would, therefore, dismiss the appeal with costs.

The dissenting judgment of Kellock and Locke JJ. was delivered by

KELLOCK J.:—I cannot accept the contention of the respondent that paragraph 3 of the agreement here in question extends to breaches on the part of the appellant of its contractual obligations. So to construe the paragraph would nullify such obligations and I do not think any such intention is to be gathered from the terms in which the agreement is expressed.

Leaving this contention aside, therefore, damage or injury might arise in the course of the carrying out of the contract not only to the person or property of others but also to the trucks and the drivers themselves. The appellant would, however, be liable only for injury or damage arising from negligence.

It is said for the respondent that by reason of the agreement between the parties, it might be held that the doctrine of *respondeat superior* would apply so as to make the appellant liable for claims of third persons and that the terms of paragraph 3 are limited to protection against such claims. I cannot, however, accept this contention. I do not think it can be doubted that the parties to the agreement contemplated that the logging operations, to which the trucking was incidental, were operations involving risk of injury not only to persons or property which might be caused by the trucks but also danger to the trucks and the truck drivers themselves from the mere presence of the latter on the appellant's premises during the carrying on of logging and loading operations.

Paragraph 3 provides not only that the trucks and their drivers shall be "the responsibility" of the truckers but also that they shall be at their "risk." "Risk" certainly includes injury or damage occurring *to* the trucks or the drivers, while "responsibility" envisages accountability for damage caused *by* the trucks or drivers. In my view these words are used in contradistinction with the result that damage to trucks and personnel as well as damage by them is expressly provided for.

With respect to protection against claims for third party damage, such a result is attained by the following language, namely, that "the trucks and the personnel operating such trucks shall at all times be . . . the responsibility of

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the truckers" who agree to "indemnify and save harmless the Company . . . for any damages that may occur arising out of the use or operation of the said trucks."

This, however, as already noted, does not exhaust the actual terms of paragraph 3 as it also provides that the trucks and the drivers shall at all times "be at the risk" of the truckers who shall also "provide their own insurance", (no doubt insurance as to the trucks themselves) and "pay their own Workmen's Compensation charges" (insurance as to the drivers) and "indemnify and save harmless the Company from any claims or damage."

With respect to the obligation to insure, it is, I think, obvious, as was pointed out by Banks L.J., in *Rutter v. Palmer* (1), that

> it is well known to be the common practice for the owners of motor-cars to insure themselves against all risks in connection with the car, that is to say against damage done not only to the car but by the car, and damage caused not only by negligent acts but by innocent acts as well.

In *Canada Steamship Lines v. The King* (2), with respect to a provision there in question that the respondents would "provide their own insurance," Lord Morton, speaking for the Judicial Committee, said at p. 211 that the other party to the contract had indicated by that language that it did not intend to be liable for any damage to the property there in question "howsoever such damage might arise."

In my view the contention of the respondent gives effect to part only of the terms of paragraph 3. I think, with respect, it cannot be so limited, and that effect can be given to all of its language only by construing it as covering damage or injury to trucks or drivers caused by the negligence of the appellant as well as damage to the person or property of third persons caused by reason of the operation of the trucks. The appellant would not be liable for any damage or injury to trucks or drivers caused otherwise than by negligence on the part of its servants.

With respect also, I cannot accept the contention that the damage here in question arose outside the scope of the contract and, therefore, outside the protection of paragraph 3. The words "at all times" sufficiently indicate that

(1) [1922] 2 K.B. 87 at 90. (2) [1952] A.C. 192.

an occasion, such as that here in question when the truck was waiting to be loaded, was, in the contemplation of the parties, an occasion within the express terms of the contract.

I would allow the appeal. The appellant should have its costs throughout.

The judgment of Estey and Cartwright JJ. was delivered by

CARTWRIGHT J.:—The facts out of which this appeal arises are undisputed. On March 5, 1948, the appellant and the respondents entered into a contract in which they are referred to respectively as "the Company" and "the Truckers". The relevant parts of this contract are as follows:—

WHEREAS the Company owns and has the right to log Timber Licences 3233p, 3234p, and 6420p, together with certain adjoining Crown Timber Sales situate in the vicinity of Elk Creek, in the District of Sayward, Vancouver Island, Province of British Columbia, with a log pond adjacent thereto, with dumping facilities (hereinafter referred to as the "Log Dump");

AND WHEREAS the Truckers are desirous of transporting the log production from the said timber lands to the Company's said Log Dump and have agreed with the Company to haul all logs produced by the Company from the area within three and one-half miles of the said Log Dump as shown on the sketch attached hereto, which area is hereinafter referred to as the "Logging Area", and to perform the additional services hereinafter set out for the remuneration and on the terms and conditions hereinafter contained;

NOW THIS AGREEMENT WITNESSETH:

1. During the life of the within contract IT IS AGREED that the Truckers shall have the exclusive right at the remuneration and on the terms and conditions hereinafter set out, to haul all logs produced by the Company from its said logging area.

2. The Truckers HEREBY COVENANT with the Company as follows:

(*a*) The Truckers shall furnish sufficient logging trucks, which in the opinion of the Company are necessary to haul all of the logs produced from the said logging area, and will at all times during the life of the within contract at the Trucker's expense, maintain and keep the said logging trucks in first-class operating condition;

(*b*) The truck or trucks to be provided by the Truckers shall, at all times during the life of the within contract, be kept in readiness and available for the purpose of hauling logs produced by the Company pursuant to the terms of this contract and that the time of loading and the despatch of the trucks for the purpose of efficiently transporting the said logs shall be at the sole discretion and control of the Company;

(*c*) The driver of each truck shall be a competent and qualified logging truck driver approved by and acceptable to the Company.

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3. IT IS UNDERSTOOD AND AGREED that the trucks and the personnel operating such trucks shall, at all times during the life of the within contract, be at the risk of and the responsibility of the Truckers and that the Truckers will provide their own insurance, pay their own Workmen's Compensation charges and will indemnify and save harmless the Company from any claims or damage or for any damage that may occur arising out of the use or operation of the said trucks for the term of the within contract.

Paragraph 4 deals with the terms of payment. The contract continues:

5. IT IS UNDERSTOOD AND AGREED that the Truckers shall haul all logs produced under the within contract to the said log dump and will, with the equipment to be provided by the Company and with the assistance of the Company's log dump employees, cause the said logs to be dumped at the Company's said log dump.

6. IT IS UNDERSTOOD AND AGREED that to facilitate the maintenance and repair of the Trucker's trucking equipment that the Truckers may use the Company's temporary garage for the purpose of making repairs and carrying out maintenance and service work on the said trucks and trailers free of charge, but that any gasoline, oils, grease, major parts or other major materials provided by the Company for such maintenance and service work shall be paid for by the Truckers at cost, and IT IS FURTHER UNDERSTOOD that the intention is that the Company shall provide the facilities in this clause referred to to assist the Truckers in maintaining the truck and trailers to be provided by the Truckers in operating conditions and that it is not intended that the Company shall in any wise be expected to provide parts or materials for overhaul.

7. IT IS UNDERSTOOD AND AGREED that the Company shall, with the use of its road grader, so far as possible keep its logging truck roads in the said logging area, and particularly the main line logging truck road, in as good shape as reasonably possible for the hauling of the said logs, subject to circumstances or conditions arising beyond the control of the Company.

8. IT IS UNDERSTOOD that the Company will furnish suitable water facilities for the purpose of cooling brakes when required and will for the purpose of enabling the Truckers to furnish light for the said temporary garage, furnish the Truckers with one of its existing gasoline light plants which it is understood the Truckers will maintain and operate for the purpose of furnishing light for the said temporary garage.

9. In order to facilitate the carrying on of continuous logging and to, so far as possible, prevent shutdowns the Truckers AGREE with the Company that they will provide without charge their equipment for the purpose of moving necessary miscellaneous equipment from one setting or logging area to another setting or logging area.

Paragraph 10 deals with terms of payment.

11. IT IS UNDERSTOOD AND AGREED that it is the intention of the Company to carry on continuous operations except for necessary seasonable shutdowns and that the Company will use its best endeavours to provide a continuous supply of logs for hauling by the Truckers but that the quantity of timber and the time of the removal thereof and the right to shutdown operations at any time and for any cause shall be solely a matter of decision by the Company and the Company shall not under any circumstances by reason of a shutdown or its inability to make logs available for transport to its said log dump be in anywise responsible to the Truckers for any claim for damages or otherwise.

It was not suggested that any other provision of the contract was material to the question before us.

On June 22, 1949, a logging truck belonging to the respondents was standing near to a spar-tree of the appellant which was used for the two purposes of yarding (i.e. drawing in by the use of tackle rigged to the spar-tree) logs and of loading them on to the trucks. Both the yarding and the loading were done by employees of the appellant. These operations were separate and were performed with different tackle and by different crews. While the truck was being loaded the appellant's yarding crew were engaged in yarding a log. This log hit and broke a "snag" which fell against and broke one of the guy-wires supporting the spar-tree, with the result that the spar-tree broke and fell on the truck damaging it to the extent of $5,549.29, for which amount the respondents brought action against the appellant. The action was tried before the Chief Justice of the Supreme Court of British Columbia (1), who found that the damage was caused by the negligence of the servants of the appellant. This finding was not questioned in the Court of Appeal (2) or before us. The learned Chief Justice held that the appellant was not relieved from liability by the terms of paragraph 3 of the contract quoted above because, in his view, the operation in the course of which the truck was negligently damaged was not within the contract and consequently the following words of Lord Greene M.R. in *Alderslade v. Hendon Laundry Ld.* (3) were applicable:—

It must be remembered that a limitation clause of this kind only applies where the damage, in respect of which the limitation clause is operative, takes place within the four corners of the contract.

(1) [1951-52] 4 W.W. R. (N.S.) 370. (2) [1952] 6 W.W.R. (N.S.) 92.
(3) [1945] K.B. 189 at 192.

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On this point Sidney Smith J.A., with whom O'Halloran J.A. agreed, held a contrary opinion which he expressed in the following words:—

> I think this too strict a view. I think it was based on his finding that the spar tree had nothing to do with the operation of loading the truck. But the evidence shows (and both counsel agree) that it had; that the same spar tree was used for yarding the logs (and it was in the yarding that negligence was found) and for loading them on to the truck. That being so, and the truck at the time being in the course of being loaded, it would seem that the damage was done while the truck was being used entirely in accordance with the contract terms, and in the very heart of the logging operations.

It is true that the words used by the learned Chief Justice who presided at the trial are open to the construction that he had overlooked the fact that the spar-tree was used in the operation of loading the trucks as well as in the operation of yarding the logs but, if this be so, in my opinion it in no way affects the validity of his conclusion. The negligent operation which caused the spar-tree to break had nothing to do with the operation of loading the truck. The reciprocal obligations with which the contract deals have to do with the loading of the logs on the respondent's trucks, the hauling of them to the appellant's log dump, and the dumping of them there. The contract is silent as to how the logs are to be brought to the places at which they are loaded. The appellant is left free to do this in any manner it sees fit or to arrange with an indepedent contractor to do it. Even if the words of the exempting clause should on a proper construction be held to apply to negligence of the appellant or its servants in regard to all matters falling within the four corners of the contract, I think that clear words would be necessary to extend it to cover damage caused by the negligence of its servants in a separate operation carried on by a different crew, and which, as has already been pointed out, the appellant was free to entrust to an independent contractor. Such operation does not in my opinion fall within the four corners of the contract merely by reason of the fact that it was being carried on in the immediate vicinity of the truck at the time it was being loaded. I am in respectful agreement with the conclusion of the learned Chief Justice of the Supreme Court of British Columbia on this branch of the matter, without finding it

necessary to resort to the rule stated in Beal's Cardinal Rules of Legal Interpretation, 3rd Edition at page 144 that:—

> Where there is any doubt as to the interpretation of any stipulation in a contract, it ought to be interpreted strictly against the party in whose favour it has been made.

I am, therefore, of opinion that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *W. S. Lane.*

Solicitor for the respondents: *G. E. Housser.*