EXCHEQUER COURT OF CANADA

BRITISH COLUMBIA ADMIRALTY DISTRICT

1954

February 1
May 21

June 8

BETWEEN:

NABOB FOODS LIMITED.....PLAINTIFF;

AND

THE *CAPE CORSO*.....DEFENDANT.

Shipping—Action for damage to cargo—Clause in bill of lading limiting liability is void—R. 8, Art. III of Schedule to English Carriage of Goods by Sea Act 1924.

Held: That a provision in a bill of lading lessening the liability of a carrier for loss or damage to goods is void as contravening R. 8 of Article III of the Schedule to the English Carriage of Goods by Sea Act 1924.

ACTION for damage to a shipment of goods.

The action was tried before the Honourable Mr. Justice Sidney Smith, Deputy Judge in Admiralty for the British Columbia Admiralty District, at Vancouver.

F. H. H. Parkes for plaintiff.

G. B. McIntosh for defendant.

The facts and questions of law raised are stated in the reasons for judgment.

SIDNEY SMITH D. J. A. now (June 8, 1954) delivered the following judgment:

This is an action by the holder of a Bill of Lading against a shipowner for damage to a shipment of black pepper in the course of a voyage from Liverpool to Vancouver, B.C. The Bill of Lading was issued in England, and it is common ground that the English Carriage of Goods by Sea Act 1924 applies. The Schedule to that Act governs Bills of Lading and R. 8 of Art. III of the Schedule provides—

8. Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect.

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The Bill of Lading (Clause 9) provides that the value of the cargo:

> . . . in the calculation and adjustment of claims for which the Carrier may be liable shall for the purpose of avoiding uncertainties and difficulties in fixing value be deemed to be the invoice value, plus freight and insurance if paid, irrespective of whether any other value is greater or less, but so that the Carrier's liability shall in no case exceed £100 per package or other freight unit or pro rata in case of partial loss or damage,

and the neat question in this case is whether this clause governs or whether it is void as contravening R. 8 of Art. III of the Schedule to the Act.

I may mention here, though its relevance is in dispute, that R. 5 of Art. IV of the Schedule to the Act provides:

> 5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding five hundred dollars per package or unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.
>
> This declaration if embodied in the bill of lading shall be prima facie evidence, but shall not be binding or conclusive on the carrier.
>
> By agreement between the carrier, master or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named.
>
> Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with goods if the nature or value thereof has been knowlingly misstated by the shipper in the bill of lading.

It is agreed that the value of the goods in question is less than £100 per package, and that the sound market value of the goods was greater than their invoice value plus freight and insurance. It seems to be also agreed that the rule, apart from contractual modifications, is that the measure of compensation for goods damaged in transit is the arrived sound market value. The question then is whether Clause 9 of the Bill of Lading effectively modifies this rule.

There is no English or Canadian decision directly in point; but there are at least two English decisions and many American decisions on the American Harter Act which have resemblances to the 1924 English Act, and there is a decision of the Australian Supreme Court on the Australian Sea Carriage of Goods Act, 1904, which is founded on the Harter Act. More recently, both the United States and Australia have Acts which incorporate the same

provisions as the Schedule to the English Act; and on these there is a decision by the Supreme Court of Australia, decisions by American Federal Courts, and a dictum in point by the American Supreme Court. There is no direct decision.

The relevant parts of the Harter Act read:

> Sec. 1. It shall not be lawful . . . to insert in any bill of lading . . . any clause, covenant or agreement whereby (the manager, agent, master or owner of any vessel) shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, etc. Any and all words or clauses of such import inserted in bills of lading . . . shall be null and void and of no effect.
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> Sec. 2. It shall not be lawful to insert in any bill of lading . . . any covenant or agreement whereby the obligations of the owner or owners of (the) vessel to exercise due diligence etc. . . . or whereby the obligations of the master, officers, agents or servants to carefully handle and stow her cargo . . . shall in any wise be lessened, weakened, or avoided.

And one matter for consideration is whether the differences between that Act and the English Act of 1924 are material enough to make decisions on the Harter Act distinguishable. A number of decisions under the Harter Act and the decision of the Supreme Court of Australia in *Australasian United Steam Navigation Company Limited* v. *Hiskens* (1) held that a clause agreeing on the value of the cargo did not "relieve" the shipper "from liability" and should be upheld. In the Australian case and in several of the earlier cases in the United States Supreme Court, valuation clauses were upheld largely because the valuation declared by the shipper was made the basis for computing the freight payable. Apart from any express agreement that the declared value should govern damage claim, it would be difficult to see how the shipper could avoid an estoppel and claim a larger amount after inducing the carrier to act on the agreed value to his detriment.

But apart from this the United States Supreme Court held that an agreement as to value was not an agreement that the carrier should "be relieved from liability". It was pointed out that the carrier's liability might be modified, but was not removed, and that if prices fell during the voyage the liability might be increased rather than lessened. This principle was carried so far that in *Smith* v. *The Ferncliff* (2), the United States Supreme Court held that a

(1) (1914) 18 Com. L.R. 646. (2) (1939) 306 U.S. 444.

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clause almost identical with Clause 9 in the present case should be upheld, even though the declared value in that case had no bearing on the freight payable. I was at first inclined to doubt the validity of this conclusion, but further reflection has persuaded me that there is much to be said for it, having regard to the language of the Harter Act. I do not however agree with one reason suggested, namely, that the clause here was a "valuation" clause. The true reason would seem to be that the clause did not purport to "relieve" the carrier from liability.

The Harter Act, it may be noted, did forbid the "lessening" of the carrier's "obligations", but these obligations were confined to obligations to carefully handle and stow cargo, and did not extend to the general obligation to pay for damage to cargo. The importance of the phraseology is shown by the case of *Chicago Milwaukee & St. Paul Railway Co.* v. *McCaull Dinsmore Company* (1). This was a decision on the Cummins Amendment Act of 1915, which dealt with interstate railway traffic. Before the amendment the governing Act was construed to permit a clause like that upheld in *Smith* v. *The Ferncliff, supra,* i.e., one fixing the value of the goods for adjustment purposes. The amendment made carriers liable for the actual loss, notwithstanding any agreement. Under this Act a clause similar to our Clause 9 was held to be invalid, and the Court would not support the clause merely because it was reasonable or on the further ground that it did not necessarily lessen the carrier's liability but might even increase it. The Cummins Amendment, it is true, expressly invalidated an "agreement as to value" which would affect liability for actual loss; whereas the 1924 Act does not do this in terms. However the *McCaull-Dinsmore* case is still important as showing that any clause within the literal prohibition of the statute cannot be supported merely because it is reasonable. Moreover the statute is not to be construed as forbidding only clauses that *necessarily* lessen liability; a clause is bad whenever in the particular case it operates against the language of the statute.

The Statute of 1924 goes considerably further than the Harter Act. Unlike the Harter Act, it not only nullifies any clause that "relieves" the carrier "from liability", but

(1) (1920) 253 U.S. 97.

also any clause "lessening such liability". This covers liability to pay, as well as obligations to handle goods properly. Such language, I think, makes the *McCaull-Dinsmore* decision applicable. That is, a clause such as we have in Clause 9 is void whenever it would operate to lessen what would otherwise be the carrier's liability, regardless of the fact that under other circumstances the effect would be to increase the liability. That, I think, is the effect of the American decisions on the new Act, which is essentially the same as the English Act. I refer to *"The Steel Inventor"* (1), and *Pan-Am. Trade & Credit Corporation et al.* v. *The Campfire et al* (2). Even *Smith* v. *The Ferncliff, (supra)* which is the most favourable case to the defendant, is small comfort, because the Supreme Court indicated quite plainly that the clause upheld under the Harter Act would have been bad under the new Act.

The defendant argued that it would be unreasonable to prevent a pre-estimate of damage when the parties (say, two minutes after a claim for damages had arisen) had it in their power to make an agreement as to the valuation, which should form the basis of an adjustment of the loss.

But the *McCaull-Dinsmore* case shows that the mere reasonableness of a clause is not enough to support it if it goes against the language of the statute. Furthermore, after a loss the parties are on a parity; but at the time of shipment the carrier is often in a position to dictate to the shipper what terms the Bill of Lading shall contain. The Act presumably strikes at such potential dictation.

But all that aside and apart from authority, looking at Clause 9 of our Bill of Lading, I find it impossible to say that this clause is not directed to liability; and, moreover, is not a clause that in this particular case lessens liability. As I have pointed out, except under special agreement, liability is for the arrived sound market value. It may be, though I need not decide the point, that if this Bill of Lading declared that the arrived sound market value was to be taken at £900, that would govern, even though I might conclude that the real market value was £1000. However, this Clause 9 does not say anything like that. It purports to substitute for the arrived market value something

(1) (1940) 35 Fed. Supp. 986. (2) (1946) 156 Fed. (2nd) 603.

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entirely different; in other words, an entirely new measure of damages for the common law measure. In this case that measure lessens the carrier's liability, and so in my view the clause cannot be given effect to.

Rule 5 of Art. IV of the Schedule seems to have no bearing here, since the plaintiff is not claiming $500.00 for any package. If the declared value had been less than $500.00 and the arrived market value more than that sum, a nice question might have arisen.

The damages will go to the learned Registrar for assessment, the measure being the difference between the arrived sound market value and the arrived damaged market value.

Judgment accordingly.