QUEBEC ADMIRALTY DISTRICT

Montreal 1966 Nov. 25 Dec. 23

BETWEEN:

ROBIN HOOD FLOUR MILLS, LIMITED ..PLAINTIFF;

AND

N. M. PATERSON & SONS LIMITED ....DEFENDANT.

Shipping—Damage to cargo—Second engineer turning on wrong valve—Whether ship owner liable—Water Carriage of Goods Act, R.S.C. 1952, c. 291, Art. IV(2)(a)—Onus of proof.

In November 1962 defendant carried a cargo of wheat for plaintiff from Kingston to Montreal in its ship. Following discharge of part of the cargo in Montreal the ship's second engineer, at the time in charge of the engine-room, was instructed to put 20 to 25 inches of water in the ballast tanks of No. 2 hold to stabilize the vessel. The second engineer turned on the wrong valve with the result that the water entered No. 2 cargo hold and damaged wheat stored there to the value of $8,777. Defendant denied liability in reliance on Art. IV(2)(*a*) of the *Water Carriage of Goods Act* R.S.C. 1952, c. 291. At the trial it was established that the second engineer was engaged at the commencement of the voyage without any inquiry as to his previous experience or record or as to his familiarity with the type of machinery and piping in the ship, which were in some respects peculiar to that ship; and that there was no plan of the engine-room piping system on board.

Held, defendant had failed to establish, as it was required to do, that it had exercised due diligence to make the ship seaworthy for the voyage in that it did not take proper care before engaging the second engineer and did not provide a plan of the engine-room piping system, and it was therefore liable for the plaintiff's loss.

The Makedonia [1962] 1 Ll. L.R. 316 applied.

ACTION for damages.

William Tetley and *Bruce Cleven* for plaintiff.

Trevor H. Bishop for defendant.

SMITH D.J.A.:—The Court, having heard the evidence and the parties by their respective attorneys, having examined the proceedings and exhibits filed and deliberated:

By its action the plaintiff claims the sum of $10,119.56 damages alleged to have been caused to the plaintiff by the failure of the defendant to safely carry, care for and discharge a shipment of 71,614 bushels of grain which the defendant contracted to transport in the vessel M.V. *Farrandoc* from Kingston, Ontario to Montreal, Quebec in accordance with the terms of a Bill of Lading dated November 26th, 1962.

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It is alleged that upon the arrival of the said vessel at Montreal on or about November 28th the said shipment was found to be short and damaged and that as a direct result of the said damage the plaintiff has sustained a loss totalling the sum of $10,119.56.

By its Statement of Defense the defendant alleges that the said Bill of Lading speaks for itself; admits that some grain was wet and damaged on arrival at Montreal, and that the defendant was the owner of the M.V. *Farrandoc*. Otherwise the allegations of the plaintiff's Statement of Claim are denied and, under reserve of the foregoing, the defendant alleges that the M.V. *Farrandoc* received on board at Kingston on or about November 22nd a bulk cargo of 71,614 bushels, number 4 Manitoba Northern Wheat; that the *Farrandoc* left Kingston on or about November 26th, 1962 and proceeded to Montreal.

It is alleged that, while attempting to stabilize the vessel at the plaintiff's dock at Montreal, by filling number 2 bottom tank with ballast water, one of the ship's engineers opened the wrong valve in the engine-room with the results that water flowed into number 2 cargo hold. The defendant alleges that the grain was duly surveyed and found to be in part wet and since part of the shipment could not be unloaded at the plaintiff's dock, due to its condition, it was left on board and later discharged and sold for a net salvage amounting to $984.58.

The defendant, without admission of liability, alleges having previously offered the plaintiff, prior to the service of the action, the said sum of $984.58, in full and final settlement of its claim, and the defendant renews its said tender of $984.58 plus interest and costs, the whole without prejudice to its defense.

The defendant denies liability in respect of the plaintiff's claim and invokes all of the clauses, rights and immunities provided by the Canadian *Water Carriage of Goods Act*, the whole in accordance with the terms of the Bill of Lading, Exhibit P-1, and alleges that there is no lien de doit between the plaintiff and the defendant.

Prior to the commencement of the hearing, the parties, by consent, filed a document dated November 22nd, 1966 entitled AGREEMENT AS TO FACTS and another docu-

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ment dated November 24th, 1966, entitled ADMISSION TO FACTS by which documents the following facts are admitted.

AGREEMENT AS TO FACTS

1. That arrived sound market value of the wetted grain in question at Montreal on November 27, 1962 was $2 05¾ per bushel, for a total of $8,777 29, being 4,266 bushels at $2.05¾ (without taking into consideration the salvage recovered).
2. That the Robin Hood Flour Mills Limited is the proper plaintiff, and the person that suffered the loss in the present claim.
3. That the defendant is the proper defendant, the vessel owner and the carrier in the present claim.
4. That bill of lading, Exhibit P-1, being a copy of the original bill of lading in question, is identical to the original bill of lading which latter need not be produced in court.

ADMISSION TO FACTS

1. That the Second Engineer of the M.V. *Farrandoc* during the time material to this action was a Mr. R. Humble.
2. That during the time material to this action he held a Third Class Combined Engineer's Certificate No. C-421.

The facts, briefly stated, are as follows:

The M.V. *Farrandoc* sailed from Kingston on November 26th and arrived at the Robin Hood Dock, Montreal at 2045 hours November 27th, 1962. She commenced discharging cargo from number 2 hold at 2200 hours. On the following morning, November 28th, at 0700 hours the vessel resumed discharging cargo from number 2 hold but at approximately 0730 hours the presence of water on the forward tank-top number 2 hold was noted, and discharging from that hold was discontinued.

The proof shows that at 0710 hours the First Officer Gignac instructed the Wheelsman Harvey to order the engineers to put 20 to 25 inches of water in the double-bottom tank of number 2 hold. Harvey immediately conveyed these instructions to Second Engineer Humble who, at the time, was in charge of the engine-room. After waiting approximately three minutes Harvey sounded number 2 bottom-tanks to verify that water had entered them but found that they were still dry. He reported this to the Second Engineer and understood that the matter was being attended to. However, about five minutes later when Harvey again sounded the said tanks he found them to be still dry and immediately reported this to the Second Engineer who apparently went to check the situation.

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The explanation for the presence of water in number 2 hold and its absence in the said ballast tanks is that the Second Engineer Humble turned the wrong valve with the result that water, instead of entering the ballast-tanks, went into the coffer-dam located between the engine-room and number 2 hold and from the coffer-dam gained entry to number 2 hold through an open drain.

The defense relied upon is that which is afforded by Article IV, paragraph 2(*a*) of the *Water Carriage of Goods Act*, R.S.C. 1952, c. 291, which provides that:

> 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.

It is the defendant's submission that the damage complained of was caused or brought about by an error in the management of the ship and therefore is something for which the defendant cannot be held responsible.

It is well established however, that before such a defense becomes available to the shipowners the latter must have established either that the vessel was seaworthy or that it (the shipowners) exercised due diligence to make the ship seaworthy for the voyage and to secure that the ship was properly manned, equipped and supplied. Unless therefore, the defendant has discharged this burden of proof the immunity provided by the said article of the *Water Carriage of Goods Act* does not apply in the defendant's favour.

The question therefore which the Court is required to determine is that of whether the defendant was successful in proving it had exercised due diligence to make a ship seaworthy and to secure that the ship was properly manned, equipped and supplied for the voyage.

On behalf of the plaintiff it was argued that this burden was not discharged and that the vessel was in fact unseaworthy and was not properly manned, equipped and supplied for the said voyage particularly in that (a) it was not established that the Second Engineer Humble was competent or that proper, or any measures, had been taken before engaging him to inquire into his competence, reliability or familiarity with the vessel's engine-room piping and machinery; and (b) no plan of the engine-room piping was

on board the vessel, and no adequate precautions were taken to lock the valve or prevent the entry of water into number 2 hold by way of the coffer-dam or to otherwise guard against an error such as that committed by Second Engineer Humble.

This officer was engaged on the same day the *Farrandoc* sailed from Kingston. Apparently he was engaged solely on the basis of the fact that he held a Second Engineer's certificate. There is no evidence to show that any inquiry was made as to this man's previous experience or record, nor does it appear that he was questioned as to whether or not he was familar with the type of engine-room machinery and piping on board the *Farrandoc*, which it appears were in some respects peculiar to that ship or at least not generally met with.

In the case of the *Makedonia* [1962] 1 Ll. L.R. page 316 it was held that the shipowners had failed to prove that they had exercised due diligence to make the ship seaworthy in that (*inter alia*) they had failed to prove that they had exercised proper care in the appointment of the ship's engineers who were inefficient at the commencement of the voyage, and that shipowners had failed to exercise due diligence to properly man their vessel and that said vessel was unseaworthy in that she was improperly manned and in that the owners had failed to provide a plan of the ballast and fuel system.

Hewson J. at page 337 wrote:

> In my view the least that should be done is to insure a careful inspection of the seaman's-book, to study the history of the applicant and to question him about it and the reasons why he left his former ships...
>
> Such important appointment to such responsible positions called for a proper interviewing and proper inquiry. I am left completely unsatisfied that the necessary steps were taken and the necessary inquiries made to discover the record and competence of the Chief Engineer. If the Chief Engineer and the Second Engineer are found to be inefficient in the sense in which I have used the word it is for the employers to show that they have exercised proper care in their appointment. I am left far from satisfied that they did so.

In the present case the Court is of like opinion concerning the engagement of Second Engineer Humble.

There is moreover the fact that there was no plan of the engine-room piping system on board the *Farrandoc*. Had such a plan been available it is reasonable to suppose that

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Humble would have availed himself of it with the result that he would not have made the error of opening the wrong valve.

At page 338 of the *Makedonia* case the learned Judge wrote:

> No satisfactory evidence has in any event been produced to me whether there was this or any other plan of the piping system placed on board the ship. The defendants have not satisfied me that there was a proper and understandable plan on board, nor again have they satisfied me that, if there had been one, it would have made no difference.

In the present case the Court is of the opinion that there was failure on the part of the defendant to exercise due diligence to make the *Farrandoc* seaworthy for the said voyage in that it did not take the care it should have taken to assure itself of the experience, competence and reliability of the Second Engineer before engaging him and did not equip the vessel with, and make available to ship's personnel, a plan of the engine-room piping system.

The Court finds moreover, that the unseaworthiness of the *Farrandoc* in the respects above-mentioned was a cause of the damage complained of.

The defendant, having failed to establish that it exercised due diligence to make the ship seaworthy for the voyage and to secure that the ship was properly manned, equipped and supplied, must be held responsible for the consequent loss and damage sustained by the plaintiff.

The proof shows that of the total shipment of 71,614 bushels of grain, 67,348 bushels were accepted as sound by the plaintiff. It is admitted that the arrived sound value at Montreal of 4,266 bushels on November 27th, 1960 was $2.05\frac{3}{4}$ per bushel, of a total of $8,777.29, which is the amount of the plaintiff's loss.

CONSIDERING that the plaintiff has established the essential allegations of its action and made good its claim to the extent of $8,777.29;

CONSIDERING that the defendant's offer and tender are insufficient and unfounded;

DOTH DECLARE said offer and tender to be insufficient and DOTH MAINTAIN the plaintiff's action and DOTH CONDEMN the defendant to pay to the plaintiff the said sum of $8,777.29 with interest and costs.