
QUEBEC ADMIRALTY DISTRICT

Montreal 1969 / Jan. 13-18, 30 / Ottawa / May 16

FALCONBRIDGE NICKEL MINES LIMITED, JANIN CONSTRUCTION LIMITED and HEWITT EQUIPMENT LIMITED ..... PLAINTIFFS;

AND

CHIMO SHIPPING LIMITED, CLARKE STEAMSHIP COMPANY LIMITED and MUNRO JORGENSSON SHIPPING LTD. DEFENDANTS.

Shipping—Lightering cargo in ship's lighter—Loss of cargo—Negligence of ship's master—Hague Rules—Whether applicable to lightering—Carrier's responsibility for discharging cargo—Immunities—Limitation of liability—Water Carriage of Goods Act, R.S.C. 1952, c. 291, Sch., Art. I(d), III, Rs 1, 2—Art. IV, Rs. 1, 2—Canada Shipping Act, R.S.C. 1952, c. 29, secs. 657 and 663.

In September 1966 a valuable tractor and generator carried by the ship *Crosbie* from Montreal to Deception Bay Quebec were, in accordance with the practice at that port and the understanding of the shipper and shipowner, off-loaded onto a lighter belonging to and carried aboard the *Crosbie*. The weather was very unsettled at the time (1100 hours) but the *Crosbie's* master wished to have the equipment ready to be put ashore at high tide which was at 1337 hours. During the crew's meal hour from 1200 to 1300 hours the lighter was left unattended moored to the ship and was striking against the ship's

1969

FALCONBRIDGE NICKEL MINES LTD *et al* *v.* CHIMO SHIPPING LTD *et al*

side in rough seas and rising winds when one of its mooring lines was observed to be loose. Before this could be remedied the lighter tilted and the tractor and generator slid off. The bill of lading, which was expressed to be subject to the Rules of the *Water Carriage of Goods Act*, permitted lightering of the cargo but also provided that the ship's liability for cargo ended with delivery of the cargo from the ship's gear at the point of discharge.

Held, the carrier was liable for the loss of the tractor and generator, but its liability was limited to $500 for each.

1. In putting the expensive equipment on the lighter in the prevailing weather and leaving it unattended without ensuring that it was adequately secured to the lighter and that the lighter was adequately moored to the ship the master and officers of the *Crosbie* were negligent.

2. The clause in the bill of lading that the ship's liability for cargo ended with its discharge from the ship's gear was subject to the understanding that the cargo be lightered ashore by the ship's lighter, which was thus a term of the contract binding on the carrier.

3. The Rules in the Schedule to the *Water Carriage of Goods Act*, R.S.C. 1952, c. 291, applied to the lightering, i.e. to the tractor and generator after they were off-loaded from the ship to the lighter, which was a ship within the definition of Art. I(*d*) of the Rules.

4. The obligation of the carrier under Art. III, R 2 to properly care for and discharge the equipment was not excluded by Art. IV, R 1 because although the lighter had been rendered unseaworthy by inadequate securing of the equipment this was because of want of due diligence by the *Crosbie's* officers, and thus of their employer the carrier, to make the lighter seaworthy, as required by Art. III, R 1. Neither was the carrier's liability excluded by Art. IV, R.2, the loss not having been caused by (para *a*) an act, neglect or default in navigation or management of the ship; (para *c*) perils of the sea; (para *d*) act of God; or (para *q*) any other cause.

   Goodwin, Ferreira & Co. et al v. Lamport & Holt, Ltd (1929) 34 Ll.L.Rep. 192; *Lindsay Blee Depots Ltd v. Motor Union Ins. Co.* (1930) 37 Ll L Rep. 220; *The Hoegh Lines v. Green Truck Sales, Inc.* 1962 A.M.C. 431; *Pyrene Co. v. Scindia Steam Navigation Co.* [1954] 2 All E.R. 158; *G. H. Renton & Co. v. Palmyra Trading Corp. of Panama* [1957] A.C. 149; *Reed v. Page* [1927] 1 K.B. 743; *Maxine Footwear Co. v. Can. Gov't Merchant Marine Ltd* [1959] A.C. 589; *Leval & Co. Inc. v. Colonial Steamships Ltd* [1961] S.C.R. 221; *Gosse Millerd Ltd v. Can. Gov't Merchant Marine* [1929] A.C. 223; *Nugent v. Smith* (1875-6) C.P.D. 423; *Keystone Transports Ltd v. Dominion Steel & Coal Corp.* [1942] S.C.R. 495, referred to.

5. Since the value of the tractor and generator were not declared by the shipper before shipment nor inserted in the bill of lading the carrier's liability for the loss was limited to $500 for each under Art. IV, R.5. Each was a "unit" within the meaning of Art. IV, R.5.

   Studebaker Distributors Ltd v. Charlton Steam Shipping Co. [1938] 1 K.B. 459; *Anticosti Shipping Co. v. Viateur St-Amand* [1959] S.C.R. 372; *Sept Iles Express Inc. v. Clement Tremblay* [1964] Ex. C.R. 213, referred to.

6. As the equipment was lost without the actual fault or privity of the shipowner, the shipowner's liability was also limited by secs. 657 to 663 of the *Canada Shipping Act*. The amount of the limitation was determined by the tonnage of the *Crosbie*, not that of the lighter, and in any case would exceed $1,000. The lighter was a "ship" within the meaning of s. 2(98).

City of Fort William v. McNamara Construction Co. (1957) 10 D.L.R. (2d) 625, distinguished.

ACTION for damages for loss of cargo.

David L. D. Beard for plaintiffs.

Trevor H. Bishop for defendants.

KERR J.:—This action arose out of the loss of a tractor and a generating set which went overboard from a barge (scow C-242-A)[1] while it was moored to the ship *P. M. Crosbie*, hereinafter referred to as "the *Crosbie*" or "the ship", at Deception Bay, Hudson Strait, Province of Quebec. The tractor and generating set had been loaded, along with other general cargo, on board the *Crosbie* at the port of Montreal for transport to Deception Bay. The *Crosbie* arrived at Deception Bay on September 18, 1966, and during the morning of September 20 her crew discharged the tractor and generating set onto the deck of one of three barges carried on the ship for the purpose of taking cargo to shore, and soon afterwards both pieces of equipment went overboard from the barge and sank. Efforts to find them were unsuccessful.

First, a word to indicate the parties and their respective interests in the action.

At the time of the loss of the tractor and generating set the plaintiff Falconbridge owned the generating set and had an interest in the tractor, as lessee, under a rental agreement with the plaintiff Janin, which in turn had rented the tractor from its owner, the plaintiff Hewitt. Falconbridge was also the shipper and consignee named in the bill of lading which was issued.

The defendant Chimo owned and operated the *Crosbie*. Chimo and the defendant Clarke Steamship had a mutual arrangement in respect of the carriage of cargo by ships

[1] In the pleadings and evidence this scow is sometimes referred to as a barge or lighter, and the several terms are interchangeable. It has no motive power, masts, sails, rudder or lights. It has a square stem and stern and a flush built steel deck.

1969

FALCONBRIDGE NICKEL MINES LTD *et al* *v.* CHIMO SHIPPING LTD *et al*

Kerr J.

of either company to northern waters, in which they used the designation "Chimo Clarke Northern Services". The defendant Munro Jorgensson was ship's agent for Chimo.

An outline of the pleadings may be useful here.

In their statement of claim the plaintiffs allege that the defendant Clarke Steamship was at all material times a part owner of the *Crosbie* or managed the ship or was the ship's agent or charterer of the ship. All of this is denied by the defendants. The plaintiffs make similar allegations in respect of the defendant Munro Jorgensson, which are denied by the defendants, except that they say that Munro Jorgensson was an agent with respect to the issuing of the bill of lading under which the shipment was carried and with respect to the booking of the shipment.

The plaintiffs also allege that the defendants contracted with the plaintiffs to transport the equipment concerned on board the *Crosbie* from the Port of Montreal to Deception Bay, where it was to be off-loaded from the ship by the defendants, in lighters to be provided by Falconbridge, and the lighters were then to be taken by the defendants to a point off shore where the equipment would be received by Falconbridge and taken to shore by Falconbridge.

The plaintiffs further allege that the equipment was received by the defendants and taken on the *Crosbie* to Deception Bay, where it was off-loaded from the ship on September 20, 1966, onto a barge belonging to the ship, and that a short time later while the barge was alongside the ship, but unattended, the barge tilted and caused the equipment to fall overboard and be lost.

The plaintiffs proceed to allege that the loss of the equipment was caused by the negligence of the defendants, the ship *Crosbie,* her master and crew and the servants, agents and employees of the defendants for whose negligence all of the defendants are responsible. Particulars of their negligence are set forth in paragraph 10 of the Statement of Claim.

The plaintiffs then allege that by reason of the said negligent acts the defendants mismanaged the cargo concerned, and that they failed to carry out their contract to safely deliver the tractor and generating set.

The plaintiffs claimed damages in the amount of $165,096.03.

The defendants Chimo and Clarke Shipping filed a joint statement of defence and the defendant Munro Jorgensson filed a separate but similar defence. *Inter alia,* they deny the allegations of fault and negligence and breach of contract, but admit that the tractor and generating set were carried by the *Crosbie* and were off-loaded from the ship onto a barge belonging to the ship and that a short time later, while the barge was alongside the ship, the barge tilted and the equipment went overboard and was lost. They pray acte of the admission in the statement of claim that there was a contract between the plaintiffs and Chimo Clarke Northern Services.

The defendants also allege that in a letter to Falconbridge, dated February 24, 1966 (Exhibit D-1), Munro Jorgensson, as agent for Chimo Clarke Northern Services, outlined an agreement whereby Chimo Clarke Northern Services agreed to carry for plaintiffs a cargo from Montreal to Deception Bay, to be discharged by the crew of the *Crosbie* onto barges and taken by them ashore, where it was to be discharged from the barges by Falconbridge; that pursuant to that agreement a regular non-valued Chimo Clarke Northern Services bill of lading (Exhibit D-2), was issued covering the cargo, which included the tractor and generating set; that the cargo was governed by all the terms and conditions of the bill of lading, which terms and conditions are binding on all the plaintiffs, and are invoked by the defendants.

They further allege that Chimo was the sole owner of the *Crosbie* and used due diligence to make her and her related equipment seaworthy, and that her related equipment included the barge or scow, C-242-A, also solely owned by Chimo.

The defendants further allege that the crew of the *Crosbie* proceeded to discharge her cargo onto the scow C-242-A and onto two barges provided by Falconbridge, all in accordance with the terms and conditions of the agreement (Exhibit D-1) and the bill of lading (Exhibit D-2); that at about 1200 hours on September 20, 1966, the crew carefully and properly stowed the tractor and generating set onto scow C-242-A, and, as agents or representatives of Falconbridge were unable to discharge the equipment from the scow immediately, it remained safely tied alongside the *Crosbie;* but between 1200-1300 hours the winds suddenly

1969

FALCONBRIDGE NICKEL MINES LTD *et al* *v.* CHIMO SHIPPING LTD *et al*

Kerr J.

and unexpectedly increased to Force 13 and caused a very rough sea near the ship which caused the scow to hit heavily against the ship, loosened its mooring lines, and caused it to list heavily, thus allowing the tractor and generating set to slide off into 15-20 fathoms of water; and although all reasonable efforts were made to locate and salvage the equipment, it was not found.

The defendants plead that the loss of the equipment was caused by an act of God or peril of the sea. They also invoke all the terms and conditions of the bill of lading and Rules in the schedule to the Canadian *Water Carriage of Goods Act*. They allege that the terms and conditions of the bill of lading governed the carriage of the shipment until it was delivered at the shore.

Each of the defendants Clarke Steamship and Munro Jorgensson alleges that it was not the owner, charterer, demise charterer or manager of the *Crosbie,* her crew or scow C-242-A and at no time material to this action did it have any control over the ship or her crew, and it invokes clause 15 of the bill of lading, set forth later herein.

Chimo further alleges that the loss of the equipment was not due to its fault or privity, and it invokes the limitation of liability in sections 657-662 of the *Canada Shipping Act* with respect to the scow C-242-A and/or the *Crosbie.*

In their reply the plaintiffs join issue with the defendants on their defence and deny that the defendants can limit their liability pursuant to the *Canada Shipping Act* with respect to the scow C-242-A or at all. They also deny the application of the *Water Carriage of Goods Act* to limit the liability of the defendants, and say that, the goods having been discharged from the *Crosbie,* the statute does not have application. They deny that the loss was caused by an error in navigation or in the management of the ship. They allege that it was caused by an error in the management of the cargo. They further deny that the loss resulted from an act of God or a peril of the sea, and that the weather was of the severity indicated by the defendants, but if such weather did occur, it was forecasted and was normally to be expected at the place and time of the loss. They also deny the validity of clauses 7 and 10 of the bill of lading to limit the liability of the defendants relating to the loss of the equipment after discharge

from the *Crosbie*. They further plead that at the time of the loss the equipment was stored on the deck of the scow. Also that at all material times the scow was in an unseaworthy condition to the knowledge of the defendants; that the defendants were all privy to the negligent acts of their servants, the master of the ship, etc., in authorizing the use of the scow for the carriage of the equipment; that the defendants failed to advise any of the plaintiffs that a ship's barge would be used to discharge the equipment or that both the tractor and the generating set would be placed on the barge at the same time; and that such use of the barge was not contemplated by the plaintiffs or the parties at the time of the making of the contract and it was a breach of the contract.

Now, as to the contract of carriage.

It was common ground at the trial that there is no wharf or pier at Deception Bay, and that ships anchor in deep water at the inner end of the Bay, and cargo is off-loaded from them to barges, which are taken to a landing beach at or near high tide, and there the cargo is off-loaded from the barges to the shore; and when conditions are not suitable for beaching, the barges can be tied to mooring buoys near the beach and taken in to the beach later for off-loading.

It was also common ground at the trial that there is a practice at Deception Bay whereby shore barges, *i.e.*, barges owned by companies which have land operations there, are permitted to be used, when available, by the cargo ships to get cargo from ship to shore.

[His Lordship here reviewed the evidence and then proceeded]:

The bill of lading contains the following provision:

> . . . If the ship is not owned or chartered by demise to the Company or Line by which this Bill of Lading is issued (as may be the case notwithstanding anything that appears to the contrary) this Bill of Lading shall take effect only as a contract with the Owner or Demise Charterer, as the case may be, as principal made through the agency of the said Company or Line which acts as Agents only, and shall be under no personal liability whatsoever in respect thereof.

In my opinion, while there were mutual arrangements between Chimo and Clarke, respecting which only some general evidence was given, the evidence does not show a contractual relationship between Clarke and Falconbridge in respect of the voyage and cargo concerned, nor anything

1969

FALCONBRIDGE NICKEL MINES LTD *et al* *v.* CHIMO SHIPPING LTD *et al*

Kerr J.

from which liability on the part of Clarke, either in tort or contract, to any of the plaintiffs can be found.

The evidence of Capt. Jorgensson[2] and Mr. Munro[3] establishes, in my opinion, that Munro Jorgensson was acting only as an agent for Chimo, seeking customers and acting as a go-between between them and Chimo, and preparing proposals for acceptance or rejection by them, but without any authority to make a contract for any of them. It had no ownership in the *Crosbie,* no control over the ship or its crew. In my opinion, the evidence does not show a contractual relationship between Munro Jorgensson and Falconbridge in respect of this voyage or cargo and there is no liability in tort or contract on the part of Munro Jorgensson.

In essence, in my opinion, the contract was between Chimo and Falconbridge. What carriage, then, was Chimo under an obligation to perform?

The bill of lading is dated at Montreal September 10, 1966, and shows, *inter alia,* Falconbridge as shipper and consignee, *P. M. Crosbie* as the ship, Montreal as the port of loading and Deception Bay as the destination. It acknowledges receipt of the cargo to be conveyed and delivered to the consignee at Deception Bay. It contains the following printed clauses in particular relation to the methods of conveyance and delivery:

> 6. (e) The Carrier shall be at liberty as often and from whatever cause and at whatever place it may deem expedient to lighter or otherwise carry the goods to and from the ship and/or to tranship into any other steamer, hulk or craft and thence to reship by lighter or otherwise into the same or any other steamer or vessel whatsoever;
>
> 7 (a) Delivery of the goods shall be taken by the consignees from the ship's tackle, package by package, immediately the ship is ready to discharge, when all responsibility of the Carrier shall cease, or, at the option of the Carrier, the goods may be discharged and stored afloat or ashore at the sole expense and risk of the consignee, but always subject to the Carrier's lien;
>
> . . .
>
> (d) The Carrier shall be at liberty to discharge day and night, holidays included, as fast as ship can deliver, regardless of weather conditions and the Carrier shall be under no liability to notify the consignee of the arrival of the goods, any custom of the port to the contrary notwithstanding;

---

[2] Marine Superintendent for defendant Chimo Shipping Limited.

[3] President of defendant Munro Jorgensson Shipping Ltd.

It also contains the following clause:

> 1. Notwithstanding anything herein contained to the contrary this Bill of Lading if,
>
> . . .
>
> (b) issued in Canada shall have effect subject to the provisions of the Rules as applied by "The Water Carriage of Goods Act" 1936 (Canada);

and it also contains the following clauses, *inter alia,* imprinted on the face of the bill of lading by means of a stamp:

> Ship's liability for cargo carried under this bill of lading is coextensive with the contract of carriage and begins and ends with the receipt of cargo in the ship's gear for loading, and the delivery of cargo from the ship's gear at the point of discharge.
>
> No liability in respect to damage of goods and/or cargo after discharge from vessel unless reported to carrier and/or his agent at time of such discharge.

Capt. Jorgensson testified that he had discussed with Herrol, of Falconbridge, that another ship, the *Woldingham Hill,* was expected to be at Deception Bay at the same time as the *Crosbie,* and consequently he told this to the captain of the *Crosbie* and told him also that there were shore barges there and for him to use whatever barges he could find available to him. The practice in previous years was the same, *i.e.,* that the ship's barges would be put off the ship and when loaded with cargo from the ship they would be taken to the shore by the ship's motor boat.

Although the stamped liability clauses which I have set forth are susceptible of an interpretation that the contract of carriage ended with the discharge of cargo from the *Crosbie's* gear, they are essentially liability clauses and such an interpretation would not make good sense in the circumstances of this case, for the bill of lading gives the carrier liberty to lighter the cargo and it was certainly the understanding of those persons from Chimo and Falconbridge who were making the arrangements for the due performance of the contract that the crew of the *Crosbie* would use the ship's barges, which were carried for the purpose, and other available barges, to take the cargo to shore. That is what was done on previous occasions under similar bills of lading. It was what was in fact done on this occasion. In my opinion, the contract must be held to have put an obligation on Chimo, as carrier, to off-load

1969

FALCONBRIDGE NICKEL MINES LTD *et al* *v.* CHIMO SHIPPING LTD *et al*

Kerr J

the cargo onto barges and to take the barges to shore, either to the beach or to the mooring buoy near the beach, at which point delivery to Falconbridge would be made. As to what barges were to be used, I am satisfied that the ship's barges were to be used and that the ship's crew would, in addition, have liberty to use shore barges if and as they would be available; but that there was no requirement that a shore barge would be used for the tractor or the generating set. Details of this nature were left to the judgment and discretion of the *Crosbie's* master, who would be in a position to make an appreciation of the situation and to make on-the-spot decisions.

I move on now to outline the circumstances in which the tractor and generating set were lost.

The *Crosbie* arrived at Deception Bay on September 18, 1966, and anchored about one-half a mile off Bombardier Beach. On September 19 the wind increased and a second anchor was put out, but the ship dragged her anchors slightly because of the wind. Her crew commenced to discharge cargo onto the ship's barges on September 18 and continued to do so on September 19. They used three barges belonging to the ship and also obtained and used Falconbridge barges. The barges were towed one at a time, by the ship's crew, using the ship's motor boat, to the beach and the cargo was taken off the barges there by the consignees or by persons on their behalf, not by the ship's crew.

[The learned Judge then reviewed the testimony of the witnesses concerning the events of September 20. This indicated that the weather at Deception Bay was unpredictable; that at 1000 hours on September 20 the *Crosbie's* master was warned by a man who came out in a boat not to bring barges in to the beach until further advised; that on the orders of the master, who wished to off-load the barge at the beach at high tide, which was at 1337 hours, the generator and tractor were loaded on the barge C-242-A. Loading, the master testified, was completed at 1145 hours, and the barge was left unattended alongside the *Crosbie* during the crew's meal hour from 1200 to 1300 hours. He testified that while having his lunch in the saloon he observed a sudden increase in the wind. Various estimates were given of the wind's force by different witnesses from as high as force 13 (83-92 m.p.h.) by the master to much lower figures by others. The high seas, it was testified, caused the barge to strike the ship's side, and around 1300 hours a mooring line on the barge was seen to be loose, causing a corner of the barge to strike heavily against the ship, but before this could be remedied the tractor and generator slid off the barge into deep water, and could not be recovered.]

It is understandable that when lightering of cargo from ship to shore is limited largely to periods of high tide the master of the ship will want to off-load the cargo into barges in advance of high tide and to proceed expeditiously to do so, unless it seems to him unsafe. However, in off-loading the heavy tractor and generating set onto one barge on the morning of September 20 the master of the *Crosbie* was running dangerously close to the margin of safety, for the weather was unsettled and worsening, the winds were shifting and increasing, and there had been waterspouts on the Bay; the experienced local man who was in charge of the beach, White, thought that the conditions and prospects were such that at or soon after 1000 hours he went to the *Woldingham Hill* and instructed the master of that ship to stop unloading, and also went to the *Crosbie* and told the master not to take cargo to shore, or words to that effect; Lewis, whose job was to observe and record the weather, said that at about 1000 hours a swell developed on account of the wind and tide, and at 1100 hours the winds were 35 m.p.h., and gusting to 50, and the Bay was "in a fit" all morning. Any barges at the *Crosbie* would have to lie alongside the ship until high tide, which would not be until 1337 hours, and during that period they would be subject to the vicissitudes of wind, waves and tide.

The evidence of Captain Bugden that the wind increased from about a fresh breeze to 70 m.p.h. during a period of only 15 minutes before the loss, is mere conjecture on his part, for he and everyone else on board the ship were below deck and none of them was aware of what was taking place elsewhere or in a good position to know what conditions on the Bay were after they went below deck.

The responsible officers of the *Crosbie* compounded the danger by leaving no one on deck to watch the weather. It was not sufficient that there were port holes in the men's mess-room or in the captain's cabin. I am satisfied that no one was really watchful of the weather or the tractor and generating set. I must assume that those responsible were not vigilant.

In my opinion, the responsible officers of the *Crosbie* did not exercise the care that reasonably prudent and experienced ship's officers would ordinarily exercise to ensure the safety of the two expensive pieces of equipment. They did

1969

FALCONBRIDGE NICKEL MINES LTD *et al* v. CHIMO SHIPPING LTD *et al*

Kerr J.

not exercise the care which was reasonably and practically possible and which they were bound to take in a situation that had elements of danger which they were aware of or should have been aware of. The least that could have been expected of them, if they were willing to risk the tractor and generating set on the barge in uncertain and worsening weather, was to ensure that the equipment was sufficiently secured to prevent it from sliding off the flush deck of the barge.

When Captain Bugden first saw the barge bumping against the ship and the tractor moving towards the side of the barge, he sought to get some one to secure the barge; but it was then too late to control events and prevent the equipment from going off the barge. However, that was a situation which the responsible officers should not have allowed to come into being. In my opinion there was, to use the words of Duff C.J. in *Canadian National Steamships v. Bayliss*[4]:

> . . . inattention to precautions which would, it is not unreasonable to consider, have, probably, had the effect of preventing the loss.

Consequently, I find that the loss of the tractor and generating set resulted from a chain (or a "network", to use an expression of Lord Shaw in another case) of causes which had its commencement by the master and officers of the *Crosbie* putting the tractor and generating set on the barge in the prevailing weather and leaving them unwatched without ensuring that they were adequately secured to keep them from sliding and without ensuring that the barge was adequately moored to the *Crosbie,* and which had its culmination soon afterwards in the tractor sliding on the flat steel deck of the barge and making it so unstable as to cause the equipment to slide overboard. The acts and omissions of the master and responsible officers amounted to negligence, in my opinion.

Having made the said findings I move now to consideration of the Rules in the Schedule to the *Water Carriage of Goods Act,* R.S.C. 1952, c. 291, including the question whether they applied to the lost equipment at the time it was lost, the equipment having by then been off-loaded from the *Crosbie* to the barge.

---

[4] [1937] S.C.R. 261 at 264.

The following comment is found in *Scrutton on Charterparties,* 17th ed., published in 1964, at p. 409:

> It has not yet been decided whether the use of the word "ship" has the effect of excluding from the "carriage of goods by sea" to which the Rules relate the lightering of goods out to a ship at the port of loading or their removal to shore by lighter at the port of discharge. If the carrier undertakes to perform these operations it seems possible that they might be considered as part of loading and discharging respectively. If he does not, it seems probable that the Rules would have no application to these operations; the terms of Article I(d) lend some support to this view.

This comment was made in view of the reasoning of Devlin J. in *Pyrene Co. v. Scindia Navigation Co.*[5], which I shall refer to later herein.

There is no doubt that the bill of lading in this case is subject to the Rules in the Schedule to the Act. Sections 2 and 4 of the Act are as follows:

> 2 Subject to the provisions of this Act, the Rules relating to bills of lading as contained in the Schedule (hereinafter referred to as "the Rules") have effect in relation to and in connection with the carriage of goods by water in ships carrying goods from any port in Canada to any other port whether in or outside Canada.
>
> 4. Every bill of lading, or similar document of title issued in Canada that contains or is evidence of any contract to which the Rules apply shall contain an express statement that it is to have effect subject to the provisions of the Rules as applied by this Act.

I have indicated that the bill of lading contains a paramount clause that it shall have effect subject to those Rules.

Article I of the Rules contains certain definitions. It reads [in part] as follows:

> In these Rules the following expressions have the meanings hereby assigned to them respectively, that is to say,
>
> (d) "ship" means any vessel used for the carriage of goods by water;

The barge C-242-A is a vessel used for the carriage of goods by water. It is used for that purpose in navigation to and from ocean-going ships in at least some waters in which such ships move. In my opinion it is a ship, within the meaning of that word in Article I of the Rules[6].

---

[5] [1954] 2 Q B. 402 at pp. 417-18, adopted by the House of Lords in *Renton v. Palmyra* [1957] A C. 149 at pp. 170, 173, 174.

[6] See the cases on the meaning of "ship" and "vessel" cited later herein in connection with the *Canada Shipping Act.*

1969

FALCONBRIDGE NICKEL MINES LTD *et al* v. CHIMO SHIPPING LTD *et al*

Kerr J

The following Rules in Articles II, III and IV may be considered next:

Article II.

Risks.

Subject to the provisions of Article VI, under every contract of carriage of goods by water the carrier, in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth.

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.

There can be no question, I think, that Article III, Rule 2, applied to the discharge of the cargo from the *Crosbie* to the barge. Subject to the provisions of Article IV, the carrier was under an obligation to "properly and carefully" care for and discharge the goods carried on the *Crosbie*.

The discharge provisions of the Rules were considered by Mr. Justice Roche in *Goodwin, Ferreira & Co. et al v. Lamport & Holt, Ltd*[7], where the facts were that cotton yarn was discharged from a ship into a lighter and then a piece of machinery was discharged and made a hole in the

[7] (1929) 34 Ll. L. Rep. 192.

lighter, through which sea water entered and damaged the yarn. On the question whether discharge of the yarn from the ship had been completed, Roche J. said, at p. 194:

> . . . The contention of the defendants with regard to the lighterage is this, that lighterage was not merely permissible and proper but that when the goods in question (the yarn) were put into the lighter the sea transit was over and the whole transit was over which was made the subject of the Carriage of Goods by Sea Act, 1924, and that therefore the defendants were not bound at that stage by the provisions of that Act, and that with regard to the risks of perils of the sea, even if there was negligence of their servants, those were all provided for at that stage and in respect of that stage by the provisions of the bill of lading itself, unaffected by and not rendered more onerous by the provisions of the Carriage of Goods by Sea Act, 1924. I think it would follow, if the contention were well founded, that the Act did not apply; that the exceptions of the bill of lading itself would be sufficient to protect the defendants upon any view of the facts of this case.
>
> But in my judgment the contention itself is erroneous. The discharge of these goods was part of the operation which are covered and affected by the Carriage of Goods by Sea Act, 1924. In my judgment the discharge of these goods was not finished when they were put into a lighter when other goods were being discharged into the same lighter to make up the lighter load which was to start for the shore. When it is contemplated that the goods are to form the lighter load with other goods, the discharge of the goods themselves within the meaning of the Act of Parliament is, in my judgment, going on so long as other goods are being raised into the lighter and stowed into the lighter alongside or on top of them.

The judgment in the *Goodwin, Ferreira v. Lamport & Holt* case (*supra*) was considered by Mr. Justice Talbot in *Lindsay Blee Depots, Ltd v. Motor Union Ins. Co.*[8] There a barge was loaded with 1000 tons of coal from a ship, and other coal from the ship was still to be loaded into it the next morning. The action was on a policy of insurance. Talbot J. distinguished the facts of the cases and said, at p. 224:

> It is obvious that the facts are not quite the same. There in the case of Goodwin, Ferreira & Co., Ltd, and Others v. Lamport & Holt, Ltd, discharge appears to have proceeded continuously. There had been no substantial interruption between the discharging of the yarn and of the machinery. In this present case discharge had been discontinued several hours. The question there arose more important in a wholly different kind of action and on the construction of a statutory enactment which has no application in the present case.

[8] (1930) 37 Ll L.Rep. 220.

1969

FALCONBRIDGE NICKEL MINES LTD *et al* *v.* CHIMO SHIPPING LTD *et al*

Kerr J.

But, on the whole, though I appreciate the argument based on what is said to be the logical application of that decision, I do not think I should be justified in taking it as governing the interpretation of the word "discharged" in a policy.

In my judgment, the 1000 tons of coal had been discharged at 7 p.m. on Aug. 11, 1924, and the risk undertaken by this policy was therefore at an end.

That judgment was also considered by the United States Court of Appeals, Ninth Circuit, in *The Hoegh Lines v. Green Truck Sales, Inc.*[9], in which, during the unloading of cargo from a ship onto a lighter, some cases of parts were damaged when dropped on the lighter, and other cases, already unloaded, were damaged thereby. The District Court had held that the *Carriage of Goods by Sea Act* (COGSA) did not apply because the parts had been discharged before they were damaged, and that the ship's liability was not limited to $500 per package or customary shipping unit under the Rules. The Court of Appeals rejected this view of the District Court, and said at p. 434:

> We believe that cargo is not discharged within the meaning of COGSA when it is still in the process of being unloaded from a vessel onto a lighter. We reject the view of the trial court that each case of spare parts was discharged when it was first lifted from the hold of the vessel by the tackle of the floating derrick *Colossus*. In *Remington Rand vs. American Export Lines* (S D.N.Y., 1955), 1955 A.M.C. 1789, 132F. Supp. 129, the court held that COGSA's exemption of a carrier from liability for fire did not apply to cargo which had been fully loaded onto a lighter for 24 hours. The court stated that discharge onto a lighter is complete "when the loading has been completed or while no other cargo is being loaded into the same lighter".

The Rules relating to discharge were examined again in 1954 by Devlin J., in *Pyrene Co. v. Scindia Steam Navigation Co.*[10], in particular relation to a situation in which a piece of machinery, a fire tender, was being lifted from a barge to the ship concerned, by the ship's tackle, and before it was across the ship's rail it was dropped and damaged, and he dealt with the application of the Rules in respect of loading onto the ship and discharge from the ship. The following are excerpts from his judgment, which, although somewhat extensive, may be usefully quoted for the purposes of this case:

> The fire tender was not the only piece of machinery supplied by the plaintiffs for shipment on board this ship, though it was the only

[9] 1962 A.M.C. 431.

[10] [1954] 2 All E.R 158.

piece that was damaged before shipment. A bill of lading had been prepared to cover the whole shipment, and it was issued to I S.D. in due course but with the fire tender deleted from it. The bill of lading incorporated the Hague Rules and was subject to their provisions, as by the Carriage of Goods by Sea Act, 1924, s. 3, it was bound to be. It is not disputed that, in this case, as in the vast majority of cases, the contract of carriage was actually created before the issue of the bill of lading which evidences its terms.

I think it is convenient to begin by considering the effect of the rules For counsel for the plaintiffs contends that, even if a bill of lading covering the fire tender had been issued incorporating the rules, the holder of the bill would not be subject to immunity in respect of an accident occurring at this stage of the loading If this is so, it disposes of the defendants' plea. If it is not so, I shall have to consider whether the rules affect the contract of affreightment when no bill of lading is issued, and whether the plaintiffs were a party to that or any similar contract. The argument of counsel for the plaintiffs turns on the meaning to be given to art. I(e) which defines "carriage of goods" as covering

> "the period from the time when the goods are loaded on to the time when they are discharged from the ship".

Counsel says these goods never were loaded *on* to the ship. In a literal sense obviously they were not. But counsel does not rely on the literal sense; there are rules which could hardly be made intelligible if they began to operate only after the goods had been landed on deck. He treats the word "on" as having the same meaning as in "free on board"; goods are loaded on the ship as soon as they are put across the ship's rail, which the tender never was He submits that the rule (which, of course, has effect in English law only by virtue of its place in the schedule to the Carriage of Goods by Sea Act, 1924) must be construed in accordance with English principles. He relies on *Harris v. Best, Ryley & Co.*, and *Argonaut Navigation Co., Ltd. v Ministry of Food, S S Argobec* ([1949] 1 All E.R. 160), which lay down the rule that loading is a joint operation, the shipper's duty being to lift the cargo to the rail of the ship (I shall refer to that as the first stage of the loading) and the shipowner's to take it on board and stow it (I shall refer to that as the second stage).

Counsel contends, therefore, that the accident occurred outside the period specified in art. I(e). So, he says, art. IV (5) (which limits liability), and, indeed, all the other rules which regulate the rights and responsibilities of the shipowner, do not apply. They are made applicable by art. II which provides that:

> ". . . under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth".

"Contract of carriage" is defined in art. I(b); the term

> "applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea . . ."

1969

FALCONBRIDGE NICKEL MINES LTD *et al* *v.* CHIMO SHIPPING LTD *et al*

Kerr J.

Then it is para. (e) of art I that contains the definition of "carriage of goods" on which counsel relies. It is in this way he argues that, if the casualty does not fall within the period covered by this last definition, the rules do not apply to it.

In my judgment, this argument is fallacious, the cause of the fallacy, perhaps, lying in the supposition inherent in it that the rights and liabilities under the rules attach to a period of time. I think they attach to a contract or part of a contract. I say "part of a contract" because a single contract may cover both inland and sea transport; and, in that case, the only part of it that falls within the rules is that which, to use the words in the definition of "contract of carriage" in art. I(*b*), "relates to the carriage of goods by sea". Even if "carriage of goods by sea" were given by definition the most restricted meaning possible—for example, the period of the voyage—the loading of the goods (by which I mean the whole operation of loading in both its stages and whichever side of the ship's rail) would still *relate* to the carriage on the voyage and so be within the "contract of carriage".

Article II is the crucial article which, for this purpose, has to be construed. It is this article that gives the carrier all his rights and immunities, including the right to limit his liability. He is entitled to do that "in relation to the loading" and "under every contract of carriage". Now, I shall have to consider later the meaning of "loading" in art. II and whether it is such as to exclude what I have called the first stage, i.e., the operations on the shore side of the ship's rail. For the moment, I am concerned only to see whether its meaning is cut down by the definition in art. I(e) on which counsel for the plaintiffs relies. The only phrase in art. II that can cut it down is the one I have quoted: "under every contract of carriage": it is only in so far as art. I(e) operates through the definition of "contract of carriage" that it can have any effect on art. II. I have already sought to demonstrate that, however limited the period in art. I(e) may be, the loading in both its stages must still *relate* to it, and so be within the definition of contract of carriage. A precise construction of art. I(e), while not irrelevant, is in no way conclusive of the point I have to decide, which turns, I think, on the meaning of "loading" in art. II.

But before I try to elucidate that, let me state my view of art. I(e). For, as I have said, though not dominant, it is not irrelevant; in construing "loading" in art. II you must have regard to similar expressions throughout the rules, art. I(e) included. In my judgment, no special significance need be given to the phrase "loaded *on*". It is not intended to specify a precise moment of time. Of course, if the operation of the rules began and ended with a period of time a precise specification would be necessary. But they do not. It is legitimate in England to look at s. 1 of the Act, which applies the rules, not to a period of time, but "in relation to and in connection with the carriage of goods by sea". The rules themselves show the same thing. The obligations in art. III(1), for example, to use due diligence to make the ship seaworthy and man and equip her properly are independent of time. The operation of the rules is determined by the limits of the contract of carriage by sea and not by any limits of time. The function of art. I(e) is, I think, only to assist in the definition

of contract of carriage. As I have already pointed out, there is excluded from that definition any part of a larger contract which relates, for example, to inland transport. It is natural to divide such a contract into periods, a period of inland transport, followed, perhaps, by a period of sea transport and then again by a period of inland transport. Discharging from rail at the port of loading may fall into the first period; loading on to the ship into the second. The reference to "when the goods are loaded on" in art. I(e) is not, I think, intended to do more than identify the first operation in the series which constitute the carriage of goods by sea, as "when they are discharged" denotes the last. The use of the rather loose word "cover", I think, supports this view.

There is another reason for thinking that it would be wrong to stress the phrase "loaded on" in art. I(e). It is, no doubt, necessary for an English court to apply the rules as part of English law, but that is a different thing from assuming them to be drafted in the light of English law. If one is inquiring whether "loaded *on*" in art. I(e) has a different meaning from "loaded" or "loading" in other parts of the rules, it would be mistaken to look for the significant distinction in the light of a conception which may be peculiar to English law. The idea of the operation being divided at the ship's rail is certainly not a universal one. It does not, for example, apply in Scotland: *Glengarnock Iron & Steel Co., Ltd. v. Cooper & Co.* (22 R. (Ct. of Sess.) 676, per Lord Trayner). It is more reasonable to read the rules as contemplating loading and discharging as single operations. It is, no doubt, possible to read art. I(e) literally as defining the period as being from the completion of loading till the completion of discharging. But the literal interpretation would be absurd. Why exclude loading from the period and include discharging? How give effect to the frequent references to loading in other rules? How reconcile it with art. VII which allows freedom of contract

> "prior to the loading on and subsequent to the discharge from . . ."?

Manifestly both operations must be included. That brings me back to the view that art. I(e) is naming the first and last of a series of operations which include, in between loading and discharging, "handling, stowage, carriage, custody and care". This is, in fact, the list of operations to which art. II is, by its own terms, applied. In short, nothing is to be gained by looking to the terms of art. I(e) for an interpretation of art. II.

I think, therefore, that art. I(e), which was the spearhead of argument of counsel for the plaintiffs, turns out to be an ineffective weapon. But that still leaves it necessary to consider the meaning of "loading" in art. II. Just how far does the operation of loading, to which art. II grants immunity, extend? Now I have already given reasons against presuming that the framers of the rules thought in terms of a divided operation, and in the absence of such a presumption the natural meaning of "loading" covers the whole operation. How far can that be pressed? Article III(2), for example, provides: "the carrier shall properly and carefully load", etc. If "load" includes both stages, does that oblige the shipowner, whether he wants to or not, to undertake the whole of the loading? If so, it is a new idea to

1969

FALCONBRIDGE NICKEL MINES LTD *et al* *v.* CHIMO SHIPPING LTD *et al*

Kerr J.

English lawyers, though, perhaps, more revolutionary in theory than in practice. But, if not, and "load" includes only the second stage, then should it not be given a similar meaning in art. II with the result that immunity extends only to the second stage? There is, however, a third interpretation to art. III(2). The phrase "shall properly and carefully load" may mean that the carrier shall load and that he shall do it properly and carefully, or that he shall do whatever loading he does properly and carefully. The former interpretation, perhaps, fits the language more closely, but the latter may be more consistent with the object of the rules. Their object as it is put, I think, correctly in Carver's Carriage of Goods by Sea, 9th ed., p. 186, is to define, not the scope of the contract service, but the terms on which that service is to be performed. The extent to which the carrier has to undertake the loading of the vessel may depend not only on different systems of law but on the custom and practice of the port and the nature of the cargo. It is difficult to believe that the rules were intended to impose a universal rigidity in this respect, or to deny freedom of contract to the carrier. The carrier is practically bound to play some part in the loading and discharging, so that both operations are naturally included in those covered by the contract of carriage. But I see no reason why the rules should not leave the parties free to determine by their own contract the part which each has to play. On this view, the whole contract of carriage is subject to the rules, but the extent to which loading and discharging are brought within the carrier's obligations is left to the parties themselves to decide.

I reject the interpretation of loading in art. II as covering only the second stage of the operation. Such authority as there is is against it. If loading under the rules does not begin before the ship's rail, by parity of reasoning discharging should end at the ship's rail; but so to hold would be contrary to the decision of Roche J., in *Goodwin, Ferreira & Co, Ltd. v. Lamport & Holt, Ltd.*

Since the shipowner in this case in fact undertook the whole operation of loading it is unnecessary to decide which of the other two interpretations is correct. I prefer the more elastic one, that which I have called the third. There appears to be no binding authority on the point. I have noted the view expressed in Carver; on the other hand, Temperley's Carriage of Goods by Sea Act, 1924, 4th ed., p. 26, and Scrutton on Charterparties, 15th ed, p. 160, consider that the carrier is responsible for the whole of the loading. However, it is sufficient for me to say that, on the facts of this case, the rights and immunities under the rules extend to the whole of the loading carried out by the defendants and, therefore, counsel for the plaintiffs' first point fails. I think, if I may so put it, that it is a good thing that it should fail. There must be many cases of carriage to which the rules apply where the ship undertakes the whole of the loading and discharging; and it would be unsatisfactory if the rules governed all but the extremities of the contract. It so happens that, in this case (rather unusually), the exemption of the extremities would benefit the shipper. For the form of bill of lading which would have applied is made subject to the rules simpliciter and does not set out the traditional mass of clauses which the rules have rendered generally ineffective. If they were there the shippers would probably

> fare worse under them than under the rules. It would certainly be a triumph for the innate conservatism of those who have not scrapped their small print if, though only on the outer fringes, it was to come into its own But the division of loading into two parts is suited to more antiquated methods of loading than are now generally adopted and the ship's rail has lost much of its nineteenth century significance. Only the most enthusiastic lawyer could watch with satisfaction the spectacle of liabilities shifting uneasily as the cargo sways at the end of a derrick across a notional perpendicular projecting from the ship's rail

This dictum of Devlin J. was applied by the House of Lords in *G. H. Renton & Co. v. Palmyra Trading Corp. of Panama*[11]. Lord Morton of Henryton said, at p. 169, in approving the interpretation given to Article III, Rule 2, by Devlin J.:

> . . . I construe the words "shall properly and carefully carry and discharge the goods carried" as meaning that the carrier must perform the duties of carriage and discharge imposed upon him by the contract in a proper and careful manner.

Lord Somervell of Harrow said, at p. 174:

> The general ambit of the Hague Rules is to be found in article III, rule 2, which has already been cited. It is, in my opinion, directed and only directed to the manner in which the obligations undertaken are to be carried out. Subject to the later provisions, it prohibits the shipowner from contracting out of liability for doing what he undertakes properly and with care. This question was considered by Devlin J. in *Pyrene Co. Ltd. v. Scindia Navigation Co. Ltd.* in relation to the words "shall properly and carefully load". I agree with his statement, which has already been cited.

In the present case the carrier carried barges on the *Crosbie* for use in lightering cargo from that ship to shore, and it used the barges for that purpose. It was bound to lighter the goods by its contract of carriage. In that situation, it is my view that the Rules applied to the lightering. The lightering should be considered as a part of the discharging operation, but even if the discharging of the goods concerned from the *Crosbie* was completed when they were put on the barge, the barge was a ship used by the carrier in performing its obligation to carry the goods by water under the contract of carriage covered by the bill of lading and consequently, in my view, the Rules applied to that portion of the carriage.

---

[11] [1957] A.C. 149.

1969

FALCONBRIDGE NICKEL MINES LTD *et al* v CHIMO SHIPPING LTD *et al*

Kerr J

The first consideration under Article IV is whether the loss resulted from unseaworthiness of the ship. There is no question that the *Crosbie* was seaworthy. Any question of unseaworthiness relates to the barge.

The plaintiffs allege that the barge was unseaworthy to receive the equipment, or, in the alternative, that it was made unseaworthy by overloading.

The barge was relatively new, undamaged and in good condition to receive cargo when loading commenced on September 20. Was it then seaworthy, *i.e.*, fit to receive the contemplated cargo as a carrying receptacle and fit to encounter the ordinary perils that were likely to be encountered in the several stages of loading, lying alongside the ship, moving from the ship to the shore, and lying moored near the shore? See, in this respect, *Kopitoff v. Wilson*[12]; *Steel v. State Line Steamship Co.*[13]; *Reed & Co. v. Page, Son and East*[14]; *McFadden v. Blue Star Line*[15]; *Elder Dempster & Co. v. Paterson, Zochonis & Co.*[16].

There is no doubt in my mind that the barge was seaworthy when the ship's crew commenced to load it.

Was it made unseaworthy by the tractor and generating set? There is ample authority for the proposition that a vessel may be made unseaworthy by wrong loading and excessive loading. See, for instance, *Reed v. Page* (*supra*) at p. 749:

> . . . I think, inasmuch as wrong loading, excessive loading, can amount to unseaworthiness, and constitute unseaworthiness, if the vessel is at the end of the loading stage so overloaded as to be a danger to herself and her cargo, that then there is a breach of the warranty which I find exists, that she shall be fit to complete or enter upon and carry out the next stage of the contract.

I am satisfied that the evidence establishes that the master and the officers of the *Crosbie* were qualified for their positions and duties on the *Crosbie* and its voyage and were competent therefor, even if negligent at Deception Bay, and that Chimo did not fail to give the master proper

---

[12] (1876) 1 Q.B.D. 377 at p. 380.
[13] (1877) 3 App. Cas. 72 at p. 86
[14] [1927] 1 K.B. 743 (C.A.) at p. 754
[15] [1905] 1 K.B. 697 at p. 704.
[16] [1924] A.C. 522 at p. 539.

instructions and necessary information as to the availability of shore barges, and otherwise. There was no want of due diligence on the part of the carrier to secure that the *Crosbie* was properly manned, equipped and supplied. But I think that the barge was rendered unseaworthy by the inadequately secured tractor and generating set. When the tractor slid towards the edge of the deck it thereby made the barge unstable. Its instability in the circumstances amounted to unseaworthiness. The loss of the tractor and generating set resulted immediately from that unseaworthiness.

The fault in that respect was that of the captain and responsible officers of the *Crosbie*. There was a want on their part of due diligence to make the barge seaworthy. They were employees of the carrier, and the carrier is responsible in law for their failure to exercise the due diligence required by Article III, Rule 1.

Cartwright J., as he then was, said in his dissenting reasons in *Maxine Footwear Co. v. Canadian Government Merchant Marine Ltd*[17], at p. 808:

> The carrier is responsible in law for the failure of his employees to exercise the due diligence required by art. III, rule 1.

On appeal[18], the Judicial Committee agreed with that statement of the law. They said, at p. 602:

> Cartwright J., dissenting, agreed with the finding that the appellants' goods were not stowed until 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:* "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 or by those whom he employs for the purpose—see *Dobell & Co. v. Steamship Rossmore Co.*"
>
> The failure to exercise due diligence by the fourth officer was therefore, if the matter becomes relevant, a failure to exercise due

[17] [1957] S.C.R. 801

[18] [1959] A C. 589.

1969

FALCONBRIDGE NICKEL MINES LTD *et al* v. CHIMO SHIPPING LTD *et al*

Kerr J.

diligence by the carrier within article III, rule 1. On this point their Lordships agree with Cartwright J.

In that same case the Judicial Committee held that Article III, Rule 1, is an overriding obligation. They said, at pp. 602-04:

> . . . 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 respondents 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 Ltd. v. Foscolo, Mango & Co.*)
>
> 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 situation, then, if the Rules applied to the tractor and generating set until they were lost, appears to me to be this: If the loss resulted from unseaworthiness of the barge

caused by want of due diligence on the part of the carrier to make the barge seaworthy, the exceptions from immunity in Article IV, Rule 2, are of no avail to the carrier, but the limitation of liability in Rule 5, where the words "in any event" are used, applies; if the loss did not result from unseaworthiness of the barge, or if it resulted from unseaworthiness which was not caused by the want of such due diligence, the carrier may have recourse to the immunities in Rule 2.

The pertinent paragraphs of Rule 2 in this case are the following:

> 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;
>
> (c) perils, danger, and accidents of the sea or other navigable waters;
>
> (d) act of God;
>
> (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.

The Supreme Court of Canada considered paragraph (a) in *Leval & Co. Inc. v. Colonial Steamships Ltd.*[19], and referred to a number of earlier decisions and the principle laid down in *The Glenochil*[20], at p. 226 as follows:

> In *Gosse Millerd Limited v. Canadian Government Merchant Marine*, it was held by the House of Lords that negligence in the management of the hatches was not negligence in the management of a ship, but they referred to a number of earlier decisions and approved the principle laid down by a Divisional Court in *The Glenochil*. That principle was accepted by the Supreme Court of the United States in cases arising under the American *Harter Act* and was affirmed and applied by the Court of Appeal in *Hourani v. Harrison*.
>
> Their Lordships pointed out in the *Gosse Millerd* appeal that there might be cases on the border line "but if the principle is clearly borne in mind of distinguishing between want of care of cargo and want of care of vessel indirectly affecting the cargo, as Sir Francis Jeune puts it, there ought not to be very great difficulty in arriving at a proper conclusion".

---

[19] [1961] S.C.R. 221. [20] (1896) P. 10

1969

FALCONBRIDGE NICKEL MINES LTD *et al* v CHIMO SHIPPING LTD *et al*

Kerr J

The principle laid down in *The Glenochil* (*supra*) was considered and approved by the House of Lords in the *Gosse Millerd* case. See footnote hereto[21].

---

[21] [1929] A.C. 223, at pp 230-33, as follows:

From the statement of the facts as found by the learned judge it could not be disputed that the respondents had failed properly and carefully to carry, keep and care for the goods carried. But the respondents pointed out that the obligation imposed upon them was expressly made subject to the provisions of Art. IV., and they claimed that the loss or damage complained of resulted from the act, neglect or default of their servants in the management of the ship. The argument at the bar turned mainly upon the meaning to be placed upon the expression "management of the ship" in that rule. The words in question first appear in an English statute in the Act now being considered; but nevertheless they have a long judicial history in this country. The same words are to be found in the well known Harter Act of the United States, and as a consequence they have often been incorporated in bills of lading which have been the subject of judicial consideration in the Courts in this country. I am unable to find any reason for supposing that the words as used by the Legislature in the Act of 1924 have any different meaning to that which has been judicially assigned to them when used in contracts for the carriage of goods by sea before that date; and I think that the decisions which have already been given are sufficient to determine the meaning to be put upon them in the statute now under discussion.

In the year 1893, in the case of *The Ferro*, certain oranges had been damaged by the negligent stowage of the stevedore. It was held by the Divisional Court that the negligent stowage of the cargo was not neglect or default in the management of the ship. Gorell Barnes J. says: "I think it is desirable also to express the view which I hold about the question turning on the construction of the words 'management of the ship.' I am not satisfied that they go much, if at all, beyond the word 'navigation.'" Sir Francis Jeune says: "It would be an improper use of language to include all stowage in such a term" (i.e., "mismanagement of the ship"). "It is not difficult to understand why the word 'management' was introduced, because, inasmuch as navigation is defined as something affecting the safe sailing of the ship . . . it is easy to see that there might be things which it would be impossible to guard against connected with the ship itself, and the management of the ship, which would not fall under navigation. Removal of the hatches for the sake of ventilation, for example, might be management of the ship, but would have nothing to do with the navigation."

In the case of *The Glenochil* the same two learned judges, sitting as a Divisional Court, held that the words did protect the shipowner for damage done by pumping water into the ballast tank in order to stiffen the ship without ascertaining that a pipe had become broken, and thereby let the water into the cargo. Gorell Barnes J. says: "There will be found a strong and marked contrast in the provisions which deal with the care of the cargo and those which deal with the management of the ship herself; and I think that where the act done in the management of the ship is one which is necessarily done in the proper

I have already stated my view of the cause of the loss of the tractor and generating set. In my opinion, the loss did not result from any act, neglect or fault in the navigation or management of the ship within the meaning of the paragraph here under consideration.

---

handling of the vessel, though in the particular case the handling is not properly done, but is done for the safety of the ship herself, and is not primarily done at all in connection with the cargo, that must be a matter which falls within the words 'management of the said vessel.'" Sir Francis Jeune says: "It seems to me clear that the word 'management' goes somewhat beyond—perhaps not much beyond —navigation, but far enough to take in this very class of acts which do not affect the sailing or movement of the vessel, but do affect the vessel herself." And referring to his own judgment in *The Ferro,* he says: "It may be that the illustration I gave in that case, as to the removal of the hatches for the sake of ventilation, was not a very happy one; but the distinction I intended to draw then, and intend to draw now, is one between want of care of cargo and want of care of the vessel indirectly affecting the cargo."

The principles enunciated in this case have repeatedly been cited since with approval in this country and in America. The same two learned judges applied them in the case of *The Rodney,* and they were accepted by the Court of Appeal in the case of *Rowson v. Atlantic Transport Co.* In that case the Court of Appeal held that carelessness in handling the refrigerating apparatus of the vessel, resulting in damage to the cargo, must be regarded as falling within the expression, on the ground that the refrigerating apparatus was used for the ship's provisions as well as for the cargo, and therefore that negligence in managing it was negligence in management of the ship.

My Lords, I do not think it necessary or desirable to discuss whether the Court of Appeal was right in their application of the principle in that particular case for reasons which will appear later; I refer to the judgment only because it accepted as the basis of the decision the construction which had been placed upon the words in the case of *The Glenochil.* In the case of *Hourani v. Harrison* the Court of Appeal had to consider the meaning to be attached to the words of Art. IV., r. 2, in a case in which loss was caused by the pilfering of the stevedore's men whilst the ship was being discharged. The Court held that this did not fall within the expression "management of the ship"; but both Bankes L.J. and Atkin L.J. (as he then was) discussed the meaning to be placed on the expression. Bankes L.J. reviews the authorities both in this country and in the United States; he points out that the principle laid down in *The Glenochil* has been accepted in the Supreme Court of the United States as being correct, and he adopts and applies that principle to the case which he is then considering. The learned judge expresses the distinction as being between "damage resulting from some act relating to the ship herself and only incidentally damaging the cargo, and an act dealing, as is sometimes said in some of the authorities, solely with the goods and not directly or indirectly with the ship herself." Atkin L.J. says: "that there is a clear distinction drawn between goods and ship; and

1969

FALCONBRIDGE NICKEL MINES LTD *et al* *v.* CHIMO SHIPPING LTD *et al*

Kerr J

Further considerations under Rule 2 of Article IV are whether the loss arose or resulted from the causes set forth in paras. (c) perils of the sea; (d) act of God; or (q) any other cause.

The defendants plead that the loss of the equipment was caused by an act of God or a peril of the sea.

The meaning of "act of God" has often been expounded. See, for example, *Scrutton on Charterparties,* 17th ed., at p. 219, *Carver on Carriage by Sea,* 11th ed., at p. 10. It will be sufficient for this case to cite what was said by James L.J. in *Nugent v. Smith*[22], as follows, at p. 444:

> . . . The "act of God" is a mere short way of expressing this proposition. A common carrier is not liable for any accident as to which he can shew that it is due to natural causes directly and exclusively, without human intervention, and that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected from him. . . .

and what was said in the same case by Cockburn, C.J. as follows at pp. 437-38:

> . . . In other words, all that can be required of the carrier is that he shall do all that is reasonably and practically possible to insure the safety of the goods. If he uses all the known means to which prudent and experienced carriers ordinarily have recourse, he does all that can be reasonably required of him; and if, under such circumstances, he is overpowered by storm or other natural agency, he is within the rule which gives immunity from the effects of such vis major as the act of God.

I have already found that the loss of the tractor and generating set could have been guarded against by the

---

when they talk of the word 'ship' they mean the management of the ship, and they do not mean the general carrying on of the business of transporting goods by sea."

My Lords, in my judgment, the principle laid down in *The Glenochil* and accepted by the Supreme Court of the United States in cases arising under the American Harter Act, and affirmed and applied by the Court of Appeal in the *Hourani* case under the present English statute, is the correct one to apply. Necessarily, there may be cases on the border-line, depending upon their own particular facts; but if the principle is clearly borne in mind of distinguishing between want of care of cargo and want of care of vessel indirectly affecting the cargo, as Sir Francis Jeune puts it, there ought not to be very great difficulty in arriving at a proper conclusion.

[22] (1875-6) C.P.D. 423.

Crosbie's crew by the exercise of reasonable care and precautions. The defence of "act of God" therefore fails.

The exception "peril of the sea" was dealt with at some length and previous decisions and statements of principles were reviewed by the Supreme Court of Canada in *Keystone Transports Ltd. v. Dominion Steel & Coal Corp.*[23]. The court said, at p. 505:

> From these authorities it is clear that to constitute a peril of the sea the accident need not be of an extraordinary nature or arise from irresistible force. It is sufficient that it be the cause of damage to goods at sea by the violent action of the wind and waves, when such damage cannot be attributed to someone's negligence.

In the present case the wind and waves played a part in making the barge bump against the *Crosbie,* with resulting sliding of the tractor, but that could have been guarded against by the ship's crew by the exercise of reasonable care and precautions. The loss is attributable to negligence. The defence of "peril of the sea" fails.

By reason of such negligence, also, paragraph (q) of Article IV, Rule 2, does not provide immunity to Chimo.

If there was a failure to properly and carefully discharge the tractor and generating set from the *Crosbie,* or if the use of the ship's barge to take the goods to the shore is considered as part of discharging to which the Rules relate, as was said in *Scrutton on Charterparties* to be possible, the limitation in Article IV, Rule 5, as follows, will apply:

> 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.

No value was declared or inserted in the bill of lading.

The interpretation to be given to the words "per package or unit" is controversial.

A footnote on p. 427 of *Scrutton on Charterparties* states that "unit" probably means the unit of enumeration or measurement shown in the bill of lading as provided by Article III, Rule 3(b).

---

[23] [1942] S.C.R. 495.

1969

FALCONBRIDGE NICKEL MINES LTD *et al* v. CHIMO SHIPPING LTD *et al*

Kerr J.

In the United States' *Carriage of Goods by Sea Act*, Cogsa, the corresponding words are:

> $500 per package . . . or, in case of goods not shipped in packages, per customary freight unit.

The expression "package or unit" was referred to in *Studebaker Distributors, Ltd. v. Charlton Steam Shipping Co.*[24] in connection with an insurance policy which provided a limitation on "packages", in that case unboxed automobiles. Goddard J. said in part as follows at pp. 466-67:

> . . . Apart, however, from the Harter Act, the plaintiffs say, firstly, that there is a short answer to this clause—namely, that it applies only to a package, and here there was no package. The goods are expressly stated to be unboxed, and the case was argued before me by both parties, who doubtless want a decision on what are known to be the actual facts, on the footing that the cars were put on board without any covering, or, to state it in another way, just as they came from the works. I confess I do not see how I can hold that there is any package to which the clause can refer. "Package" must indicate something packed. It is obvious that this clause cannot refer to all cargoes that may be shipped under the bill of lading; for instance, on a shipment of grain it could apply to grain shipped in sacks, but could not, in my opinion, possibly apply to a shipment in bulk. If the shipowners desire that it should refer to any individual piece of cargo, it would not be difficult to use appropriate words, as, for instance, "package or unit," to use the language of The Hague Rules. The only case that I have been able to find that assists, though perhaps not much, is *Whaite v. Lancashire & Yorkshire Ry. Co.* There the plaintiff put pictures into a wagon with sides but no top, and loaded it on a railway truck, and the Court held that the wagon was a parcel or package within the Carriers' Act, as the goods were packed in the wagon. It seems to me that the primary object of this clause is to protect a shipowner against receiving an article of considerable value so covered as to prevent him from seeing what it is, this being at least one of the objects of the Carriers' Act, and in *Whaite's* case Bramwell B. stressed that though the railway company could see that there were pictures in the wagon, they could not see their exact character, as this was concealed by the plaintiff's mode of packing. While I hope I am not giving an unduly narrow construction to the clause, I do not feel that I can hold that a motor-car put on a ship without a box, crate or any form of covering is a package, without doing violence to the English language.

The Supreme Court of Canada had the question in *Anticosti Shipping Co. v. Viateur St-Amand*[25], in connection with a motor truck. In giving the judgment of the court, Rand J., as he then was, said in part as follows, at pp. 376-77:

> Here no value of the truck was declared or inserted in the bill; it is not suggested that the rule does not distribute all liability for

[24] [1938] 1 K.B. 459.

[25] [1959] S.C.R. 372.

damages, and the limit of $500 "per package or unit" must then be applied. The word "package" is clearly not appropriate to describe a truck in the condition of that here and may be disregarded; and this leaves our enquiry to the term "unit".

The limitation is clearly for the benefit of carriers by water, dictated by considerations of important policy. I see no ground for implying any duty on the part of the carrier to bring the fact of limitation to the notice of a shipper or in any other respect to concern himself with the requirement which the statute makes equally apparent to both parties. By s. 2 of the statute

> ...The Rules relating to bills of lading as contained in the Schedule...have effect in relation to and connection with the carriage of goods by water in ships carrying goods from any port in Canada to any other port whether in or outside Canada.

and that imperative is likewise binding on both of them.

The word "unit" would, I think, normally apply only to a shipping unit, that is, a unit of goods; the word "package" and the context generally seem so to limit it. But there has been suggested and in some cases the rule specifies the unit of the charge for freight. Neither the bill of lading nor the evidence here throws any light on the freight rate unit. There seems to have been only a flat charge of $48 plus $3 wharfage fee; there is no indication, for example, of a rate based on tonnage or any other weight quantity. The weight of the truck is shown, but to assume that the charge is calculated on a rate for 100 pounds would bring a fractional figure which is most unlikely to represent the actual basis. The sum of $500 would scarcely be taken as a fair limitation of the value of the average 100 pounds weight of freight; in this case the amount would be the product of 102.16 units at $500 each or $51,000 which seems disproportionate to any policy estimate to be attributed to the rule. And the absence itself of any reasonable ground for extending the word to that type of measure, with the other considerations, excludes its application here.

We are left, then, to take the unit as being that of the article. That this may produce anomalies is indisputable, but the rule does not seem to permit qualification. The responsibility for seeing that the value of the thing shipped is declared and inserted on the bill is on the shipper and any consequential hardship must be charged against his own failure to respect that requirement.

An analogous case came before the United States Court of Appeal, Second Circuit, in *Isbrandtsen Company, Inc. v. United States of America*. There the provision of the rule was,

> In case of any loss or damage to or in connection with goods, exceeding in actual value $500 lawful money of the United States, per package or, in case of goods not shipped in packages, per customary freight unit, the value of the goods shall be deemed to be $500 per package or per unit, on which basis the freight is adjusted and the Carrier's liability, if any, shall be determined on the basis of a value of $500 per package or per customary freight unit, . . .

The shipping unit was a locomotive and tender which was likewise the unit for the freight charge in the flat sum of $10,000. There were

1969

FALCONBRIDGE NICKEL MINES LTD *et al* *v.* CHIMO SHIPPING LTD *et al*

KERR J.

10 in all of these units. Augustus Hand, Ct. J., at p. 92 uses this language:

> This interpretation may lead to a strange result, for freight on small locomotives under twenty-five tons is computed per ton and consequently would involve a larger liability than is imposed for the more expensive locomotives involved here. But the language of the limitation is controlling and applies to the locomotives and tenders here by its express terms. Our conclusion accordingly is that Isbrandtsen's liability is limited to $500 per unit of locomotive and tender, or $5,000 in all.

The application there was much more serious than that here and I see no warrant for any other conclusion than that the damage in this case must be limited to the same sum of $500.

There is an interesting discussion as to the meaning of "package" in the United States' *Carriage of Goods by Sea Act* (Cogsa) in *Mitsubishi International Corp. v. Steamship Palmetto State and States Marine Corp. of Delaware*[26].

In *Sept Iles Express Inc. v. Clement Tremblay*[27], Kearney J., of this court, had the problem in connection with a motor truck. The respondent argued that "unit" means the article shipped. The appellant argued that it means a unit of weight, or customary freight unit. In giving effect to the limitation of $500, Kearney J. said at pp. 216-18:

> I think the definition given by the respondent to the word "unit" is more in keeping with its natural and usual meaning than the one advocated by the appellant, especially since the word forms part of the phrase "package" or "unit". Although it is etymologically possible to give a different generic meaning to the two words, I think there is insufficient law or fact in the circumstances to warrant doing so.
>
> It cannot be disputed that s. 5 of Art. IV was designed for the protection of carriers, and, if the appellant's interpretation of "unit" were accepted, it would, in my opinion, for reasons hereinafter mentioned, serve to defeat the purpose of the legislation and render the immunity or limitation meaningless.
>
> Furthermore, to allow the appellant's omission to make a declaration of value to prevail would not be unlike allowing the shipper to invoke his own omission to penalize the carrier by substituting $70,000 instead of $500 as the latter's limit of liability. Perhaps this word "omission" is not the appropriate term because there is no evidence that the failure of the shipper or its agent to cause a valuation to be inserted in the bill of lading was due to inadvertency. Indeed, if the appellant anticipated that the meaning it now seeks to attribute to the word "unit" would prevail, doubtless it would have been careful to refrain from making any declaration of value.

---

[26] 1963 A.M.C. 958.

[27] [1964] Ex. C.R. 213.

It is well recognized that in fixing freight rates, whether on land or sea, there are more than a dozen factors which are taken into consideration: see Freight Traffic Red Book, 1955, published in the United States In my opinion, the most important of these are the value, bulk, weight and risk of handling the article I place value first since it is an ever-present factor which accounts for the rate differential applicable to the carriage of two articles of the same size and weight but where the value of one greatly exceeds the value of the other. But this is not the only reason why great importance is attached by the carrier to the shipper's valuation of the object to be shipped. True, such declared valuation, insofar as the carrier is concerned, is only *prima facie* evidence of the actual value of the article shipped, and is not binding on him, but as I read the Act it is not open to the shipper to claim any damages in excess of the amount of his declared valuation.

Counsel for the shipper pointed out that acceptance of the definition given by the respondent leads to an anomaly in as much as it permits a carrier who, as in the present case, has been found negligent for failure to properly stow a new motor vehicle, which could be readily seen to be worth far more than $500 and for which, as subsequent evidence shows, the shipper had paid approximately $20,000, to argue that his liability be restricted to $500.

In the *Anticosti* case, in the court of first instance the learned trial judge relied on such an anomaly, particularly since the truck in question was not boxed and the carrier could easily see that its value far exceeded $500, and condemned the defendant to pay $4,222. On appeal that reasoning in the Court of Queen's Bench was not accepted by Owen J, but he affirmed the said judgment on other grounds, namely, that no bill of lading (or similar document) existed and that in consequence Art. IV(5) was inapplicable.

It is interesting to note that Owen J, who delivered the said judgment, observed that, in his opinion, the reasons given by the trial judge were untenable. Rand J in rendering the judgment of the Supreme Court agreed with Owen J. in this latter respect, but found, contrary to the judgment of the Court of Appeal, that a bill of lading had been filled out but mislaid, that Art. IV(5) was applicable and that the amount of damages must be limited to $500, and he maintained accordingly the appeal.

It is important to note that the so-called anomaly referred to by counsel for the appellant could have been eliminated and would never have arisen if the shipper had inserted the valuation which he attached to the motor vehicle in question; and if he had inserted its valuation at approximately $20,000, which is a large sum, this would have permitted the carrier to charge more freight or take special precautions in protecting the unit from loss or damage.

Counsel for the shipper pointed out that in the United States the word "unit", as contained in our Act and the corresponding British Act, was replaced with the phrase "customary freight unit". (See Carver—Carriage of Goods by Sea, 9th ed., at pp. 1102 and 1108). Although it is said that this alteration "would appear to have been made to clarify the meaning of unit rather than change it", I am not satisfied that such is the case.

Mr. Justice Goddard, in the case of *Studebaker Distributors Ltd. v. Charlton Steam Shipping Co. Ltd.* wherein a bill of lading contained a clause by which it was agreed that the value of each "package"

1969

FALCONBRIDGE NICKEL MINES LTD *et al* *v.* CHIMO SHIPPING LTD *et al*

Kerr J.

did not exceed $250, expressed the opinion that both the terms "package" or "unit", as found in The Hague Rules, referred to an individual piece of cargo, as appears from the following extract found at page 467 of his judgment. (Note: The extract is quoted *supra* at p. 62 hereof.)

In the present case, the freight rate was as stated in the letter from Munro Jorgensson to Falconbridge, Exhibit D-1, as follows:

> $34 00 per ton of 2,000 pounds or 40 cubic feet, whichever is the greater. Freight considered prepaid. National Harbours Board Wharfage at Montreal for account of shipper at current rate which is presently 60¢ per cargo ton.

and in the column in the Bill of lading headed "No. of Packages and Contents", there appears "2 Cat. Diesel Electric Sets crated and mounted on steel bases"; and "1 Caterpillar D8 Tractor . . . ". The weights are shown in pounds; measurements are in feet and inches. Numerous other items of cargo are shown, including boxes, cartons, barrels and bags.

It seems to me that it would be incongruous to treat the generating set as a package, because it was crated, and apply to it a limitation of $500, and at the same time apply to the tractor a limitation based on a unit of ton or cubic foot measurement, which would result in a limitation, not of $500, but of an amount reached by multiplying the number of such units in the tractor by $500.

In the absence of binding authority to the contrary, I am disposed to do as Mr. Justice Kearney did in the case he decided and hold that each of the pieces of equipment, the generating set and the tractor, is a unit to which the limitation of $500 in Article IV, Rule 5, applies. And I so hold.

In their arguments at the hearing, counsel referred to certain clauses in the bill of lading, in addition to the Rules, relating to the carrier's liberties and liability.

Carver in *Carriage by Sea* says, at p. 139, that in shipping cases a shipowner may contract out of all liability, including liability for negligence, only if he uses exceptionally comprehensive general words, and, at p. 140, that it is now settled that the words "at shipper's risk" do not exempt the shipowner from liability for negligence, and the onus of disproving negligence is on him, although they do not prevent him from relying on a specific exception in the contract which does relieve him from such liability. Of course,

Article IV, Rule 8, makes certain clauses of this kind null and void in bills of lading that have effect subject to the provisions of the Rules as applied by the *Water Carriage of Goods Act*.

The principles to be applied to clauses which purport to exempt one party to a contract from liability were set forth by the Judicial Committee in *Canada Steamship Lines Ltd. v. The King*[28], as follows, at pp. 207-08:

> In considering this question of construction their Lordships have had in mind articles 1013 to 1021 of the Civil Code of Lower Canada and also the special principles which are applicable to clauses which purport to exempt one party to a contract from liability. These principles were stated by Lord Greene M.R. in *Alderslade v. Hendon Laundry Ld.* as follows: "Where the head of damage in respect of which limitation of liability is sought to be imposed by such a clause is one which rests on negligence and nothing else, the clause must be construed as extending to that head of damage, because it would otherwise lack subject-matter. Where, on the other hand, the head of damage may be based on some other ground than that of negligence, the general principle is that the clause must be confined in its application to loss occurring through that other cause to the exclusion of loss arising through negligence. The reason is that if a contracting party wishes in such a case to limit his liability in respect of negligence, he must do so in clear terms in the absence of which the clause is construed as relating to a liability not based on negligence."
>
> It appears to their Lordships that none of the judges of the Supreme Court regarded this passage as being in any way in conflict with the law of Lower Canada, and Kellock J. observed: "It is well settled that a clause of this nature is not to be construed as extending to protect the person in whose favour it is made from the consequences of the negligence of his own servants unless there is express language to that effect or unless the clause can have no operation except as applied to such a case."
>
> Their Lordships think that the duty of a court in approaching the consideration of such clauses may be summarized as follows:—
>
> (1) If the clause contains language which expressly exempts the person in whose favour it is made (hereafter called "the proferens") from the consequence of the negligence of his own servants, effect must be given to that provision. Any doubts which existed whether this was the law in the Province of Quebec was removed by the decision of the Supreme Court of Canada in *The Glengoil Steamship Company v. Pilkington.*
>
> (2) If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens. If a doubt arises at this point, it must be resolved against the proferens in accordance with article 1019 of the Civil Code of Lower Canada: "In cases of doubt, the contract is interpreted against him who has stipulated and in favour of him who has contracted the obligation."

[28] [1952] A.C. 192.

1969

FALCONBRIDGE NICKEL MINES LTD *et al* *v.* CHIMO SHIPPING LTD *et al*

Kerr J.

(3) If the words used are wide enough for the above purpose, the court must then consider whether "the head of damage may be based on some ground other than that of negligence," to quote again Lord Greene in the *Alderslade* case. The "other ground" must not be so fanciful or remote that the proferens cannot be supposed to have desired protection against it; but subject to this qualification, which is no doubt to be implied from Lord Greene's words, the existence of a possible head of damage other than that of negligence is fatal to the proferens even if the words used are prima facie wide enough to cover negligence on the part of his servants.

I have considered the additional clauses and will include them as an appendix. But, on my appreciation of the contract of carriage, which was to take the cargo from Montreal to the beach at Deception Bay, using the *Crosbie* and its barge facilities, and on my finding that the Rules apply thereto, these clauses are not, in my view, effective to relieve Chimo from the consequences of its negligence or to limit its liability respecting the loss of the tractor and generating set, whatever effect they might have in other respects.

If the Act and Clause 1(b) of the bill of lading do not apply the Rules to the lightering of the cargo from the *Crosbie* to the shore or to the tractor and generating set after they were off-loaded onto the barge, it may be, nevertheless, that the Rules so apply by reason of the contract of carriage, for Clause 1(b) of the bill of lading states that it shall have effect subject to the provisions of the Rules, and Clause 10 provides that all the terms and provisions of and all the exemptions from liability expressed and incorporated in the bill of lading shall extend and apply to loss of goods in the custody of the carrier subsequent to their discharge from the ship as fully as if they were set forth seriatim in that paragraph.

While a fine distinction may be drawn between the words "subject to" in Clause 1(b) and "expressed and incorporated" in Clause 10, I am disposed to find, and I do find, that the effect of these clauses is to incorporate the provisions of the Rules into the lighterage portion of the contract. It seems unlikely that the parties to this single contract of carriage intended that one set of laws and rules, *viz,* the *Water Carriage of Goods Act* and its Rules, would apply to the voyage from Montreal to Deception Bay, but that, as soon as cargo was placed on a barge of the ship to be taken to shore, that Act and its Rules would cease to

apply thereto, and a new set of laws, including the provisions of the Civil Code of the Province of Quebec, would come into operation and apply to such cargo and the rights and obligations of the parties in respect of it.

The defendants also invoked the limitation of liability in sections 657 to 662 of the *Canada Shipping Act*, with respect to the *Crosbie* and/or the barge C-242-A.

The portion of section 657 which is pertinent herein is as follows, as amended by S. of C., 1961, c. 32, s. 32:

> 657. (1) For the purpose of sections 657 to 663
>
> (*a*) "ship" includes any structure launched and intended for use in navigation as a ship or as a part of a ship; and
>
> . . .
>
> (2) The owner of a ship, whether registered in Canada or not, is not, where any of the following events occur without his actual fault or privity, namely:
>
> . . .
>
> (*b*) where any damage or loss is caused to any goods, merchandise or other things whatsoever on board that ship;
>
> . . .
>
> (*d*) where any loss or damage is caused to any property, other than property described in paragraph (*b*), or any rights are infringed through
>
> (i) the act or omission of any person, whether on board that ship or not, in the navigation or management of the ship, in the loading, carriage or discharge of its cargo or in the embarkation, carriage or disembarkation of its passengers, or
>
> (ii) any other act or omission of any person on board that ship;
>
> liable for damages beyond the following amounts, namely:
>
> . . .
>
> (*f*) in respect of any loss or damage to property or any infringement of any rights mentioned in paragraph (*d*), an aggregate amount equivalent to 1,000 gold francs for each ton of that ship's tonnage.

Section 661 is as follows:

> 661. For the purposes of section 657 and 660, the tonnage of any ship that is less than three hundred tons shall be deemed to be three hundred tons.

Section 2(98) is as follows:

> 2. In this Act,
>
> (98) "ship" includes every description of vessel used in navigation not propelled by oars; for the purpose of Part I (Recording, Registering and Licensing) and sections 657 to 662 inclusive (Limitation of Liability) it includes every description of lighter, barge or like vessel used in navigation in Canada however propelled;

1969

FALCONBRIDGE NICKEL MINES LTD *et al* v. CHIMO SHIPPING LTD *et al*

Kerr J.

Insofar as the barge C-242-A is concerned, I think that there is ample authority for me to find that it is a "ship" within the meaning of section 2(98) of the *Canada Shipping Act*. See, among other cases, the following which were cited by counsel in argument: *Gapp v. Bond*[29]; *The Lighter No. 3*[30]; *The Gas Float Whitton No. 2*[31]; *Polpen Shipping Co. v. Commercial Union Assuce. Co.*[32]; *The Mudlark*[33]; *Weeks v. Ross*[34]; *The Harlow*[35]; *Marine Craft Constructors, Ltd. v. Erland Blomqvist (Engineers), Ltd.*[36]; *Mary McLeod v. The Ontario-Minnesota Pulp and Paper Co. et al*[37]; and *City of Fort William v. McNamara Construction Co.*[38].

Having regard to my findings, I think that Chimo is entitled to limit its liability pursuant to sections 657 to 663 of the *Canada Shipping Act*.

A question whether such limitation should be based upon the tonnage of the *Crosbie* only, or the barge only, or the combined tonnage of both, was raised at the hearing. Certain tug and tow cases were cited in this respect. See *City of Fort William v. McNamara Construction Co.* (*supra*) and *Monarch Towing & Trading Co. v. B.C. Cement Co.*[39], in which the tug and its tow were held to be one ship for purposes of limitation of liability under the *Canada Shipping Act*. However, I do not think that the circumstances in those cases and in this case are analogous. The barge was carried on the *Crosbie* for use in discharging the *Crosbie's* cargo, and the *Crosbie's* crew used the barge in the discharging operation. The carrying capacity upon which the profit of the contract depended was in the *Crosbie*. In the circumstances, it is my opinion that the limitation of liability should be based upon the tonnage of the *Crosbie* only.

It was agreed by the parties, at the argument, that if the amount of the limitation of liability under the *Canada Shipping Act* becomes material, there should be a reference to ascertain the tonnage in question. Such a reference

---

[29] (1887) 19 Q B D 200
[30] (1902) 18 T L R. 322
[31] [1896] P. 42
[32] 74 Ll. L. Rep. 157.
[33] [1911] P 116
[34] [1913] 2 K.B 229.
[35] [1922] P. 175
[36] [1953] 1 Ll L. Rep. 514.
[37] [1955] Ex. C R. 344
[38] (1957) 10 D L R. (2d) 625.
[39] [1957] S C R. 816

would not serve a useful purpose if my conclusions are correct, for the limitation of $500 per package or unit under the *Water Carriage of Goods Act*, a total of $1000 for the tractor and generating set, is much less than the amount of any limitation under the *Canada Shipping Act* based upon the tonnage of the *Crosbie*. However, if a reference should become necessary, the matter may be spoken to.

In *Club Coffee Co. v. Moore-McCormack Lines, Inc. et al*[40], a case involving a failure to deliver a portion of a ship's cargo, Thurlow J., of this court, said at pp. 369-70:

> In most cases of this kind the measure of the damages recoverable for failure to deliver goods is the value of the goods at their destination at the time they should have been delivered pursuant to the contract of carriage and it is, I think, for this reason that in many expressions of judicial opinion the measure of such damages has been referred to as being the value of the goods. The true measure of such damages, however, was, I think, somewhat more accurately expressed by Lord Esher, M R. in *Rodocanachi v. Milburn* ((1886) 18 Q.B.D. 67), when he said, at page 76:
>
> > I think that the rule as to measure of damages in a case of this kind must be this: the measure is the difference between the position of a plaintiff if the goods had been safely delivered and his position if the goods are lost.
>
> So expressed the measure of damages appears to me to coincide with the principle of *restitutio in integrum* and to be broad enough to include the whole of the owner's loss . . .

I have found that Chimo is entitled to limit its liability and I am satisfied that the amount of its liability as so limited will be substantially less than the damages which would otherwise be recoverable by the plaintiffs against Chimo in this action, in contract or in tort. However, I shall determine such damages for the purposes of the action.

In a letter to Falconbridge, dated May 9, 1966, Exhibit P-22, the plaintiff Hewitt quoted $186,000 for 3 generating sets. Falconbridge bought 2 of the sets for $124,000, Exhibit P-6. Both sets were identical and each included a control panel. It was one of these sets that was lost, but its control panel was shipped separately and was not lost. Sales officers of Hewitt put the price of the panel, if sold separately, at $5,000. Hewitt sold a similar set, without a panel, to Falconbridge in June 1967, for $57,000.

The lost tractor was rented by Hewitt to the plaintiff Janin under an agreement dated August 26, 1966, Exhibit

[40] [1968] 2 Ex. C R. 365.

1969

FALCONBRIDGE NICKEL MINES LTD *et al* *v.* CHIMO SHIPPING LTD *et al*

Kerr J.

P-11, at a monthly rental of $4,000 for each working month and $450 for each winter month. In the agreement the value of the tractor was stated to be $77,888, inclusive of 6% provincial sales tax. Janin was responsible to pay the price of the tractor in event of its loss. Concurrently, Hewitt gave Janin an option to purchase the tractor for $73,480, exclusive of the provincial sales tax, Exhibit P-12. The price included a blade and a "C" frame, which were not lost. Moreault, Manager Sales Administration of Hewitt, divided the total price of $77,888 as follows: tractor only $64,180; blade and "C" frame $9,300; provincial sales tax $4,408. In turn Janin rented the tractor to Falconbridge by an agreement dated September 12, 1966, Exhibit P-18, on the same rental terms, and in the agreement the replacement value of the tractor, complete, was stated to be $78,000. After the loss of this tractor Hewitt rented a replacement tractor, only slightly different, to Janin on the same terms, Exhibit P-16, and then Janin rented it to Falconbridge on identical terms, Exhibit P-23. Falconbridge later purchased this tractor by paying $76,000 in rental payments, and a balance of $2,000, plus $4,211.67 interest, Exhibit P-30. By agreement between Falconbridge and Janin, Falconbridge paid Hewitt $77,888 in reimbursement for the lost tractor and the blade and "C" frame, which were not lost. The Engine Sales Manager of Hewitt testified that the price Hewitt puts in its leasing agreements is the current market price at Montreal at the date of the leasing.

The dimensions and weights of the lost machines were not established in evidence with exactness and I think that on the evidence I cannot do better than to use the computation of freight, heavy lift and wharfage charges which were prepared by Captain Jorgensen and received as Exhibit D-22, as follows: Generating set – freight $775.20; heavy lift – $62.22; wharfage – $4.14; Total – $841.56: Tractor – freight $1,472.20; heavy lift – $487.80; wharfage – $10.84; Total – $1,970.84.

On the basis of the foregoing I find that the market value of the generating set and tractor at the time and place of their loss was their said sales price plus freight, heavy lift and wharfage charges, respectively, which in the case of the generating set was $57,000 plus $841.56 for a total of $57,841.56, and in the case of the tractor was $64,180 plus

6% provincial sales tax plus $1,970.84 for a total of $70,001.64. Accordingly, I find Falconbridge's damages to be $57,841.56 and the plaintiffs' damages in respect of the tractor to be $70,001.64.

In argument, counsel for the plaintiffs asked that one month's rental of the tractor be also allowed as damages. It appears to me that any rental that was paid was credited on the replacement tractor which Falconbridge purchased. He also asked that the damages include an amount of $938.76 for insurance premiums paid by Falconbridge and for interest at 5% on the amount of damages from the date of the loss to date of judgment. I am not satisfied that these amounts should be allowed as damages.

In the result:

(1) the action against the defendants Clarke Steamship Company Limited and Munro Jorgensson Shipping Ltd. will be dismissed;

(2) the plaintiff Falconbridge Nickel Mines Limited will have judgment against the defendant Chimo Shipping Limited in respect of the lost generating set for $500, and the plaintiffs will have judgment against the said defendant in respect of the lost tractor for $500;

(3) I will hear the parties with regard to the matter of costs upon a motion for judgment.

APPENDIX to Reasons for Judgment of Kerr J. in Falconbridge Nickel Mines Limited, Janin Construction Limited and Hewitt Equipment Limited, Plaintiffs, and Chimo Shipping Limited, Clarke Steamship Company Limited and Munro Jorgensson Shipping Ltd., Defendants, Court No. 1368.

Clauses in the Bill of Lading

Ship's liability for cargo carried under this bill of lading is coextensive with the contract of carriage and begins and ends with the receipt of cargo in the ship's gear for loading, and the delivery of cargo from the ship's gear at the point of discharge.

. . .

No liability in respect to damage to goods and/or cargo after discharge from vessel unless reported to carrier and/or his agent at time of such discharge.

. . .

All deck cargo carried at owner's risk.

2. Some other exceptions:—The Carrier shall not be liable for:—

. . .

(e) more than the invoice or declared value of the goods, whichever shall be least;

1969

FALCONBRIDGE NICKEL MINES LTD *et al* *v.* CHIMO SHIPPING LTD *et al*

Kerr J.

6. The Carrier shall have the following liberties, any warranty or rule of law notwithstanding:—

. . .

(b) To carry goods of all kinds, dangerous or otherwise, and to carry livestock and/or goods of any description on deck but when so carried the same shall be entirely at owner's risk;

7. Methods of Delivery:

(a) Delivery of the goods shall be taken by the consignees from the ship's tackle, package by package, immediately the ship is ready to discharge, when all responsibility of the Carrier shall cease, or, at the option of the Carrier, the goods may be discharged and stored afloat or ashore at the sole expense and risk of the consignee, but always subject to the Carrier's lien;

. . .

(d) The Carrier shall be at liberty to discharge day and night, holidays included, as fast as ship can deliver, regardless of weather conditions and the Carrier shall be under no liability to notify the consignee of the arrival of the goods, any custom of the port to the contrary notwithstanding;

10. Before Loading and after Discharge:

The terms and provisions of and all the exemptions from liability expressed and incorporated in this Bill of Lading shall extend and apply to loss or detention of or damage to goods in the custody of the Carrier, or his servants, prior to loading on and subsequent to the discharge from the ship on which the goods are carried by sea as fully as if the same were set forth seriatim in this paragraph, provided always that neither the Carrier nor the ship shall under any circumstances be liable for loss or detention of or damage to goods arising from any cause whatsoever when the goods are not in the custody of the Carrier or his servants.

The language in the proviso in Clause 10 "under any circumstances" and "from any cause whatsoever" (when the goods are not in the custody of the carrier or his servants) is much stronger than the words used in the other clauses. There would have been no difficulty in inserting in the clauses an express reference to negligence or other equally clear words embracing negligence, if the clauses had been intended to protect against the consequences of negligence. The clauses do not clearly relieve from such consequences. The risks and liabilities to which the clauses relate may also include loss or damage due to causes other than negligence of the carrier or its servants.