

ARTHUR EVANS AND ANOTHER

v.

TUVAMILA LIMITED

[SUPREME COURT, 1965 (Mills-Owens C.J.), 19th February,
10th March]

Appellate Jurisdiction

Shipping—cargo—loss through negligence of shipowners—exemption clause—ship-owners common carriers throughout and not mere bailees—exemption clause not applying—Sea Carriage of Goods Ordinance (Cap. 231) ss.2,4.

The respondent company's copra was lost while being transferred from the shore to the appellants' ship in the ship's whaleboat. Through the negligence of the appellants the boat was caught by the ship's sponson and tipped over before the ship's tackle had been brought into use.

The only shipping document was a Shipping Receipt issued to the shippers by the appellants in respect of the cargo, clause 25 of which provided (inter alia) that the sole risk of lighterage should be borne by the shipper. The freight paid included the cost of lightering.

Held: 1. The contract of affreightment extended to the carriage of the copra from the shore to the port of discharge and in these circumstances clause 25 never operated to govern the lighterage.

2. The shipowners were to be taken to have contracted as common carriers and to have retained that character throughout; they failed to establish a contract for the performance of the lighterage by them in the character of bailees.

3. Having regard to their obligations as common carriers clause 25 did not operate to exempt the shipowners from liability for their admitted negligence.

Cases referred to: *Pyrene Co. Ltd. v. Scindia Navigation Co.* [1954] 2 Q.B. 402; [1954] 2 W.L.R. 1005; *Renton (G.H.) & Co. Ltd. v. Palmyra Trading Corporation of Panama* [1956] 1 Q.B. 462; [1956] 1 All E.R. 209; *Producer Meats v. Thomas Borthwick* [1964] N.Z.L.R. 700; *Rutter v. Palmer* [1922] 2 K.B. 87; 127 L.T. 419; *Belfast Ropework Co. v. Bushell* [1918] 1 K.B. 210; 118 L.T. 310; *Consolidated Tea etc. Co. v. Oliver's Wharf* [1910] 2 K.B. 395; 102 L.T. 648; *Palgrave, Brown & Son Ltd. v. Turid* [1922] 1 A.C. 397; 127 L.T. 42; *The "Galileo"* [1914] P.9 affirmed [1915] A.C. 199; 111 L.T. 656; *Keane v. Australian Steamships Proprietary Ltd.* (1929) 41 C.L.R. 484.

Appeal from a judgment of the magistrate's court.

R. A. Kearsley for the appellants.

D. M. N. MacFarlane for the respondent company.

The facts sufficiently appear from the judgment.

A MILLS-OWENS C. J. : [10th March, 1965]—

This case raises the question of liability of the appellant ship-owners for loss of cargo in the following agreed state of facts: On the 24th May, 1963 the ship "Dobiri", owned by the appellants or a concern in which they were interested, was anchored some 200 yards out to sea for the purpose of taking on a cargo of copra from the respondent Company's Tuvamila estate. The copra was being lightered to the ship by means of the ship's whaleboats, manned by members of the ship's crew. In the course of the operation fifty-nine sacks of copra were embarked in one boat which was then towed out by the ship's launch until it came alongside the ship. There was a swell running, and as the whaleboat lay alongside the ship the swell lifted it up causing it to be caught by the ship's sponson. (The sponson is the wooden rib running the length of the side of the ship to prevent the ship being damaged when it goes alongside). As a result the whaleboat was tipped over and the copra was spilled into the sea, becoming a total loss. On the facts as agreed the ship's tackle had not yet been brought into use, so that the lightering operation was not yet concluded. The respondent Company, Tuvamila Limited, recovered judgment for £176, the value of the copra, in the Magistrate's Court at Suva. It is accepted that there was negligence on the part of the appellant ship-owners in failing to make proper provision for fending off the whaleboat as she lay alongside the ship. (Some difficulty regarding the position of the appellants as parties to the case arose in the Magistrate's Court but that is no longer material). I will refer to the appellants as the 'shipowners', and to the respondent Company as the 'shipper'.

E Clause 25 of a Shipping Receipt issued to the shipper by the ship-owners in respect of the cargo reads as follows —

F "25. (a) The sole cost and the sole risk of lighterage, railage or other mode of conveying the goods prior to the loading on and subsequent to the discharge from the vessel on which the goods are carried by sea, by whosoever such lighterage, railage or other mode of conveying shall be performed, shall be borne by the shipper.

G (b) For the purpose of clarifying the meaning of the foregoing sub-clause it is hereby agreed and declared that the word 'Vessel' shall not for the purposes of the said sub-clause include lighters, ship's boats and such subsidiary craft."

H The document contains the usual 'clause paramount' subjecting all the terms and conditions thereof to the provisions of the Sea-carriage of Goods Ordinance (Cap. 231). This is in accordance with the requirements of section 4 of the Ordinance, the provisions of which have given rise to some argument. The Ordinance embodies the Hague Rules, the purpose of which is to standardise, within certain limits, the rights of the holder of a bill of lading against the ship-owner (particularly in the circumstances of modern commerce where

the holder may be a banker or other interested person who was not a party to the bill and thus had no effective control over its terms) and to impose certain minimum liabilities on sea-carriers issuing bills of lading.

By section 2 of the Ordinance the Rules, which are framed as Articles, are to have effect "in relation to and in connexion with the carriage of goods by sea". Under Article I —

" 'contract of carriage' 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, ;

and

'carriage of goods' covers the period from the time when the goods are loaded on to the time when they are discharged from the ship."

Paragraph 8 of Article III precludes any agreement which relieves the shipowner from the liabilities imposed on him by the Rules, which liabilities include the obligation to "properly and carefully load" the cargo. Article VII, however, permits an agreement exempting the shipowner from liability for loss or damage to cargo arising in connexion with the handling of the cargo "prior to the loading on". *Scrutton on Charterparties* (17th Edn. p.409) suggests that where the shipowner undertakes the lighterage then, possibly, lighterage may be regarded as part of the 'loading'. Paragraph (b) of Clause 25, in my view, counters that. The case of *Pyrene v. Scindia Navigation Co.* [1954] 2 W.L.R. 1005 is also in point. There the Court was concerned with a case in which a tender was being lifted on to the ship by ship's tackle, when, before it was across the ship's rail, it was dropped and damaged. It was argued that as it never crossed the ship's rail the Rules did not apply. Lord Devlin rejected the argument, saying —

"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. (1952), 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 upon different systems of law but upon 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."

A This interpretation was approved by the Court of Appeal and the House of Lords in *Renton v. Palmyra* [1956] 1 Q.B. 462; (1957) 2 W.L.R. 457. Liability under the Rules, according to these authorities, attaches not to a period of time but to a contract or part of a contract. It is the contract which defines the scope of the work to be done by the shipowner; the Rules then say what liabilities and immunities attach thereto. In the present case Clause 25 purports to envisage the lightering as an operation which might fall to be performed by the shipowners, as in the event it was performed, but as a separate part of the contract of affreightment. What was sought to be achieved, no doubt, was that the lightering should be subject to the special provisions of Clause 25, leaving the loading within the ambit of the Rules. Article VII would permit of this, as lighterage obviously relates to the handling of the goods "prior to the loading on" and the definitions of "contract of carriage" and "carriage of goods" are in consonance with Article VII. It would follow that a special agreement as to lighterage would not be invalidated by paragraph 8 of Article III. The question is whether there was such a special agreement in the present case and, if so, in what capacity did the shipowners enter into that agreement — as common carriers or as bailees.

D The significance of the capacity in which the shipowners contracted, as to the lighterage, if in fact they did contract to perform it, is that if they did so merely as bailees then, by reason of well-settled principles, Clause 25 would be ineffective to protect them from liability for negligence. The principles referred to are summarised by North P. in the New Zealand case of *Producer Meats v. Thomas Borthwick* [1964] N.Z.L.R. 700 at pp. 702-3, as follows —

F "The common law has always recognised that parties are free to modify obligations imposed by the common law by means of the terms of an express contract, but has always insisted that they 'cannot be removed by subtle implications or ambiguous words': per Lord Buckmaster in *London and North Western Railway Co. v. Neilson* [1922] 2 A.C. 263, 266. The person claiming the benefit of the exemption from his common law liability for negligence must do it 'in clear and unambiguous language' and 'he must use ordinary English and not inventive words of doubtful meaning': per Lord Dunedin in the same case, adopting the language of Scrutton L.J. in the Court below. The insistence of the common law that 'adequate words' be used, to quote the language of Scrutton L.J. in *Rutter v. Palmer* [1922] 2 K.B. 87, 92, lies in the fact that the common law, as Fullagar J. said in *Wilson v. Darling Island Stevedoring and Lighterage Co. Ltd.* (1956) 95 C.L.R. 43, 70, 'has always frowned on such provisions and insisted on construing them strictly'. Thus if, as is the case with the common carrier, liability for damage is more extensive than liability resting on negligence and nothing else, then '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': per Lord Greene M.R. in *Alderslade v. Hendon Laundry Ltd*, [1945] K.B. 189, 192. If, on the other hand, the liability of the defendant rests on negligence alone, then 'the clause will more readily operate to exempt him'. Per Scrutton L.J. in *Rutter v. Palmer* (supra), for where liability rests exclusively on negligence, then 'unless it is construed so as to cover the case of negligence there would be no content for it at all seeing that his only obligation is to take reasonable care': per Lord Greene M.R. in *Alderslade's case* (supra) 192; 245. But even so, 'nothing should be taken as weakening the rule that to exempt from negligence very clear words should be used': per Scrutton L.J. in *Reynolds v. Boston Deep Sea Fishing and Ice Co. Ltd.* (1922) 38 T.L.R. 429."

The words of Lord Atkin in *Rutter v. Palmer* (supra) may also be quoted —

"The liability of the carrier (of goods by sea) is not confined to his acts of negligence or those of his servants; it extends beyond liability for negligence; therefore when a clause in the contract exempts the carrier from any loss it may have a reasonable meaning even though the exemption falls short of conferring immunity for acts of negligence. That is the reason at the root of the shipping cases."

It is urged by Mr. McFarlane, on behalf of the shipper, that it is the custom in these islands for ships to undertake lighterage from shore to ship. He points out that there are, in fact, no lightermen in the Islands, and that it is admitted that the freight paid or contracted for in the present case covered the lighterage from shore to ship. In these circumstances, he contends, the contract of affreightment between the parties covered all operations, from the shore to the port of discharge, and thus the shipowners contracted as common carriers throughout. Mr. Kearsley for the shipowners contends that with respect to the lighterage they acted not as common carriers but in the capacity of lightermen. In that capacity they were merely bailees. They did not hold themselves out as willing to accept the goods of anyone; they confined themselves to readiness to lighter the goods of particular persons only, namely those customers who had entered into contracts with them for carriage of their goods by sea. It being an essential feature of the activities of a common carrier that he holds himself out as ready to accept the goods of all-comers, it followed that the shipowners in the present case were not common carriers in so far as the lighterage was concerned (compare *Belfast Ropework Co. v. Bushell* [1918] 1 K.B. 210 and *Consolidated Tea etc. Co. v. Oliver's Wharf* [1910] 2 K.B. 395).

It is clear, I would commence by saying, that in the absence of custom or special agreement it is the duty of the shipper to bring the cargo to the side of the ship, within reach of the ship's tackle and at his own expense; if, therefore, the ship is lying at anchor so

that the cargo has to be taken out to her in lighters, it is the duty of the shipper to provide the necessary lighters and pay the expenses of lightering the cargo, subject, as has been said, to custom or special agreement (35 *Halsbury*, (3rd Edn) para. 554 p. 387). Custom cannot override an express provision of the contract (*Palgrave v. Turid* [1922] 1 A.C. 397). There is no dispute that the "Dobiri" was a general ship with respect to her sea voyages from port to port, but that does not, of course, resolve the question between the parties. The argument based on custom must, I think, fail for the reason that I have no evidence of such a custom as is alleged, much less that it extends to the shipowners being common carriers with respect to the lighterage. Such a custom may exist but in the present case there is no evidence to support it. As to the matter of special agreement, I take it that a shipowner may contract, with respect to the handling of cargo before it is loaded or after it is discharged, in whatever terms he may induce the shipper to accept — in terms excluding all liability on the part of the ship if the shipper will agree. The present case must, I think, be viewed against its proper background. Ostensibly there was only the one contract, the Shipping Receipt, albeit containing a part which purports to deal separately with the lighterage. But the freight paid or contracted for covered carriage of the cargo right from the beach to the port of discharge. The implication sought to be brought about by Clause 25 was that the shipowners, on anchoring to send ship's boats to lighter the copra, assumed the character of mere bailees, liable only for negligence, reverting to the character of common carriers once the lightering was concluded. Such a change in their legal relations with the shipper would not be impossible, or even unusual, but I think the onus rests upon the shipowners to prove a real agreement in those terms. The contract, in so far as it is contained in the Shipping Receipt, does not expressly provide for it and it is not, in my view, to be implied from the terms of Clause 25. Clause 25, distinctly, is permissive only in its terms as to anyone other than the shipper undertaking the lighterage. It therefore merely purports to create a special agreement as to the lighterage as between the shipper and the shipowners, in a situation, moreover, where the freight paid or contracted for included the cost of lightering. In my view the contract of affreightment extended to the carriage of the copra right from the shore to the port of discharge. In those circumstances Clause 25 never operated to govern the lighterage. There is no evidence of a request by the shipper to the shipowners that they undertake the lighterage, whether on the terms of Clause 25 or otherwise; nor of a course of dealing from which to imply such a request on the terms of Clause 25. To imply such a request, by reason of Clause 25 alone, would be to impose on the shipper a bargain to which, so far as the evidence goes, he never gave a real consent. In my view, the shipowners are to be taken to have contracted as common carriers and to have retained that character throughout. Fundamentally, they fail to establish a contract for the performance of the lighterage by them in the character of bailees. That was left to barely possible implication, in the vague or ambiguous terms. Clause 25, whilst it distinguishes the lighterage as a separate operation does not purport to distinguish the legal capacity in which, with respect thereto, the shipowners are to act. It was

open to the shipowners, having regard to Article VII of the Rules, to contract expressly as bailees with respect to the lighterage, but they chose to express themselves, in Clause 25, in oblique terms of 'risk'. The shipper was justified in concluding that the shipowners were contracting throughout as common carriers. That is the character they would be expected to have assumed as owners of a general ship carrying cargo on the basis of an inclusive freight and of a printed document in a form common to bills of lading containing a 'clause paramount'. Having regard to their obligations as common carriers, and consistently with the authorities which are quoted above, I hold that Clause 25 does not operate to exempt the shipowners from liability for their admitted negligence.

I know of no authority directly in point. In the case of the "*Galileo*" (1914) P.9 (affirmed on other grounds in the House of Lords (1915) A.C. 199) the question was one of lighterage during transhipment. A number of authorities deal with the obligations of shipowners on discharge of the cargo, including the case where they retain possession of cargo after discharge pending its collection by the consignee; cases in which exemption clauses have played a large part, as for example the case in the Australian High Court of *Keane v. Australian Steamships Propy. Ltd.* (1929) 41 C.L.R. 484. One or two authorities deal with lighterage to the ship by ship's boats, but only where the relevant clause imposes the same obligations as the ship is subject to as a common carrier. However that may be, the present case as I have viewed it depended entirely on the question what was the real agreement between the parties and that is what I have endeavoured to ascertain, on such evidence as is available.

For the reasons given above the appeal is dismissed.

Appeal dismissed.