H.M. THE KING v APIA STEVEDORING CO. LTD.

High Court Apia
17, 25 October 1938
Harley CJ

COMMON CARRIERS (Lighterage contracts) - Strict liability for damage to goods carried - Defences of act of God, shipper's implied acceptance of risk, and local custom negativing strict liability - Proof of local custom or usage.

Certain bags of dried cocoa delivered by plaintiff shipper to defendant lighterers to be put aboard a ship in the Port of Apia were damaged by a sudden heavy rain squall. Plaintiff claimed the cost of their reconditioning from defendant. Defendant pleaded act of God; that the time of loading having been specified by plaintiff through its agents defendant was not negligent in loading at the time of the storm, or at all; that knowing the goods would be carried by open lighter plaintiff impliedly accepted the risk of damage by rain; and that a local custom or usage existed in the Port of Apia that shippers would make no claim against lighterers except for negligence.

Held: The evidence did not support defendant's contention as to specification by plaintiff of the time of loading, and in any event, defendant as a common carrier was prima facie liable without proof of negligence. Further, the evidence did not support the existence of any local custom or usage that strict liability would not be enforced with respect to lighterage contracts. Defendant had failed to discharge the burden on him of proving it was of long standing and well known and accepted by all concerned, plaintiff's witnesses having denied any knowledge of it.

The defence of act of God also failed since a sudden heavy rain squall was foreseeable in the area at the relevant time (November) and could have been guarded against: Nugent v. Smith (1876), 1 C.P.D. 423 referred to; Baldwin's, Ltd. v. Halifax Corpn. (1916), 85 L.J.K.B. 1769 followed.

Jackson for plaintiff.
Pleasants for defendant.

Cur adv vult

HARLEY CJ. In this action plaintiff seeks to recover for damage done to certain cocoa by rainwater. The facts, which are either agreed or admitted, are as follow.

Plaintiff, trading as the Crown Estates, was the owner of certain cocoa which had been dried, bagged, and made ready for shipment. Defendant carries on business as a lighterer and carries goods from the jetty at Apia to the ships lying in the roadstead. On the afternoon of 8th November, 1937 plaintiff delivered some two hundred bags of cocoa to the defendant to be put aboard the S.S. Wairuna. The cocoa was duly loaded in defendant's lighters and went off to the ship. One lighter load was put aboard, but before the other lighter had commenced to unload a heavy rain squall came on as the result of which some eighty-eight bags of cocoa got more or less wet. The lighter was brought back to the jetty and unloaded and plaintiff took back the eighty-eight bags and unpacked and dried the contents. The damages claimed in this action represent the cost to the plaintiff of reconditioning the wetted cocoa.

It was admitted by the solicitor for the defendant that the defendant is a common carrier. As such, defendant is responsible for the safety of the goods entrusted to it in all events except when loss or injury arises from act of God or the King's enemies. The defendant promises to bring

the goods safely to their destination, or indemnify the owner for their loss or injury whether happening through the defendant's own default or not, but the promise is defeasible upon the occurrence of an act of God. Once the admission had been made by the defendant that it was a common carrier the plaintiff's case was in the main confined to proving the nature and extent of the damages sustained. This point I will deal with later.

The solicitor for the defendant based the defence on four distinct points, which were:-

1. The damage was sustained as the result of instructions given to the defendant by the plaintiff by his agents the U.S.S. Coy. as to the particular time at which this cocoa should be sent off to the ship, and that no negligence in this, or any other respect, was shown against the defendant.

I find from the evidence, however, that the time of delivery at the ship was arranged by the Captain of the ship, the agent of the U.S.S. Coy., and the servants of the defendant, acting together, and that the plaintiff merely delivered the cocoa to the defendant's lighters when it was asked for. I cannot see how, in making these arrangements, either the Captain or the agent of the U.S.S. Coy. can be said to be acting as agent for the plaintiff.

Further, it is objected that no negligence has been proved against the defendant. But it is clear law that it is not necessary to prove negligence in order to support a claim against a common carrier. That is one of the disadvantages which a common carrier has to put up with. He is said to insure or warrant the safe delivery of the goods he carries, and in order to support a prima facie case against him it is only necessary to prove that the goods have not been safely delivered.

2. The second point taken by the defence is that the damage sustained was due to an act of God. If proved, this constitutes one of the few defences open to a common carrier in answer to a claim against him for damage to goods carried. I have examined the authorities quoted by the solicitor for the defendant and I find that the term, from being employed in its widest sense to cover any event arising from natural, as opposed to human agency, reaches its narrowest limits when applied to common carriers. In this last case, although it need not be a natural event of such a nature as might be described as catastrophic: Nugent v. Smith (1876), 1 C.P.D. 423; it is such an operation of the forces of nature as reasonable foresight could not provide against: Baldwin's Ltd. v. Halifax Corpn. (1916), 85 L.J.K.B. 1769.

A careful examination of the evidence convinces me that this rain squall cannot in any case have been called "catastrophic". It was undoubtedly heavy and it was clearly unforeseen, or at least it was not noticed in time to take adequate steps to protect the cocoa in the lighter. The Acting Director of the Observatory, who gave evidence for the defence, said that the rainfall for that day was not unusual for November, stating, "that is the season when people expect rain", but that between 8:00 and 9:00 p.m. the greatest hourly rainfall for November occurred, amounting to .85 inches for the hour.

Mr Hellesoe was in charge of the lighters at the ship on behalf of the defendant. He was more or less caught unawares by the squall, but he must have had at least twenty-five minutes to prepare for it. He did what he could to prepare for it and put an extra tarpaulin on the lighter, which, however, proved insufficient to keep the rain out. There was no time to take the lighter ashore before the squall. Was this squall then of such a nature as reasonable foresight could not have provided against? I am satisfied that it was not. It was known by all concerned that this month of November is a wet month, one when sudden and heavy rain may be expected. After hearing the evidence I am satisfied that this damage was unfortunate, but that it could have been prevented if the cocoa in the lighter had been sufficiently covered, or in other words, if the lighter had been carrying such additional tarpaulins as the nature of the cargo and the season warranted. The evidence shows that the cocoa was damaged by rain from the top, not by water on the floor rising up from the bilges of the lighter. Reasonable foresight could, in my opinion, have provided against the damage.

Therefore the defence of act of God must fail.

3. The third point raised is that as plaintiff knew the lighters were open ones the carriage of the cocoa in an open lighter and subject to

the risks attendant thereon was an implied term in the contract. I do not think that is so. Plaintiff is not in fact concerned with how the goods are carried. The defendant is employed to put them aboard the ship in good order and the means employed in doing so are no concern of the plaintiff. Plaintiff is entitled to rely on the warranty afforded by the fact that defendant is a common carrier.

This defence is, therefore, of no avail.

4. The fourth point raised for the defence is that there is a usage or custom of the Port of Apia that consignors shall make no claim against the defendant for loss of or damage to goods in course of transit unless such loss or damage is directly caused by the negligence of the defendant, or its servants. It is alleged that this custom is universal and so well established that it has become an implied term in every lighterage contract with the defendant.

Proof of such a custom lies upon the party asserting it. Evidence of the alleged custom was given by witnesses for the defendant only, and witnesses for the plaintiff, who is one of the biggest shippers in the Port, denied all knowledge of it.

In order to set up a usage or custom as an implied term in a contract it is necessary to prove that it is of long standing and so well known to everyone concerned that its existence is taken as a matter of course in all contracts to which it refers.

This does not seem to be the case here and the evidence called by the defendant is insufficient to prove it. Therefore this defence must fail also.

The defendant having failed on all the points raised, Judgment must be for the plaintiff.