1958
Sept. 7
1959
Feb. 5

QUEBEC ADMIRALTY DISTRICT

BETWEEN:

SAVOY SHIPPING LIMITED .....PLAINTIFF;

AND

QUEBEC HYDRO-ELECTRIC COMMISSION AND LUCIEN BLOUIN .. } DEFENDANTS;

AND

ANGLO CANADIAN PULP AND PAPER MILLS LIMITED ..... } MIS-EN-CAUSE.

Shipping—Action for damages in form of demurrage—Jurisdiction of Admiralty Court—Failure to prove custom or usage governing stevedoring at point of unloading—Time to unload unreasonable and excessive—Party properly added as defendant though he did not sign charter party as intended—Damages based on expenses of maintaining ship and crew—Claim for loss of profits not established.

In an action for damages in the form of demurrage alleged to have resulted from undue delay in unloading plaintiff vessel M/V *Savoy* the Court found that the defendant Blouin was properly added as a defendant and that the time taken to unload the *Savoy* was unreasonable and exceeded the time it should have taken to discharge her.

Held: That the Admiralty Court has jurisdiction to hear the action since s. 18, s-s. 3 of the *Admiralty Act* gives that Court jurisdiction to hear and determine "any claims arising out of an agreement relating to the use or hire of a ship".

2. That the defendant Blouin was properly added as a defendant since he did not act solely as agent of the defendant commission because although the charter party was not signed by him he is named therein as charterer and the document, prepared by the plaintiff, was handed to Blouin on the understanding that he would sign and return it to the plaintiff which he had failed to do.

3. That neither does the plea in the defence justify the admission of evidence as to the custom or usage governing stevedoring at the port of unloading nor does the evidence heard establish the existence of any such custom or usage.

4. That taking into consideration and making reasonable allowance for prevailing weather conditions and the difficulty of obtaining personnel at the port of unloading the time taken to unload the *Savoy* was unreasonable and exceeded the time that it would have taken to unload her if reasonable diligence had been exercised.

5. That the plaintiff is entitled to recover the expenses of maintaining ship and crew at that time of year but that its claim for compensation for alleged loss of profit has not been established.

ACTION for damages for delay in unloading plaintiff's vessel.

The action was tried before the Honourable Mr. Justice Arthur I. Smith, District Judge in Admiralty for the Quebec Admiralty District, at Montreal.

Leopold Langlois and *Maurice Jacques* for plaintiff.

Louis N. LaRoche for defendant Quebec Hydro-Electric Commission.

François deB. Gravel for defendant Lucien Blouin.

No one appeared for Anglo-Canadian Pulp & Paper Mills Ltd., mis-en-cause.

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

SMITH D.J.A. now (February 5, 1959) delivered the following judgment:

By its action the plaintiff seeks to recover damages in the form of demurrage alleged to have resulted from the undue delay in discharging its vessel M/V *Savoy* which had been chartered by the defendant Blouin to transport a cargo of cement and steel from Quebec to Forestville.

Although originally the action was directed solely against the defendant Commission, with Blouin named as mis-en-cause, the plaintiff was permitted to amend its action in order to add Blouin as a defendant.

The action, insofar as Blouin is concerned, is based on his alleged undertaking as charterer to have the vessel discharged immediately upon her arrival at Forestville and as against the defendant Commission by reason of its obligations as consignee to discharge the vessel with all reasonable dispatch.

The plaintiff instituted the present action by way of petition of right taken in the Superior Court for the District of Quebec in virtue of Art. 1011 *et seq.* C.P. and said petition of right was granted by the Lieutenant-Governor on the 1st day of February 1956 without prejudice and under reserve of the rights of the Crown and of the Quebec Hydro Electric Commission, allowing the plaintiff to sue the defendant Commission in the Admiralty Court.

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Although by their respective pleas to plaintiff's action the defendants do not allege lack of jurisdiction on behalf of the Admiralty Court to hear and adjudicate upon the present proceedings, both defendants argued at the trial that this Court is without jurisdiction to hear and adjudicate upon a claim against Her Majesty in the right of the Province of Quebec and that such lack of jurisdiction may be urged at any stage of the proceedings.

I do not propose to deal at any length with the question of whether or not the proceedings taken by way of petition of right are regular and well founded, first, because the defendant Commission, by its plea, neither attacked nor put in question the said proceedings; and second, because, in my opinion, it was unnecessary for the plaintiff to initiate its action by proceedings in the nature of petition of right.

Since neither the Rules of the Admiralty Court, nor those of the Exchequer Court contain any reference to proceedings by way of petition of right in respect of claims against Her Majesty in the right of the Province, and since the only provision contained in the *Code of Civil Procedure* of the Province of Quebec relating to petition of right apply to proceedings taken before the Superior Court or Magistrate Court of this province, the law and practice in force in England must be applied. (*Admiralty Rules*—Rule No. 215—*Exchequer Court Rules*—Rule 2)

Since the enactment of the *Crown Proceedings Act (England) 1947* (10-11 George VI, Chapter 44, Section 1) actions *in personam* against the Crown, in cases of the nature of the present litigation, may be instituted as of right without it being necessary to proceed by petition of right.

The question concerning the jurisdiction of this Court to hear and determine the issues raised by the present action, in so far as it is directed against the Crown, is a serious one to which I have given considerable attention.

By Section 91 of the *British North America Act* the Parliament of Canada was given exclusive jurisdiction to legislate in respect of "Shipping and navigation". The Admiralty Court, although constituted as that part of the

Exchequer Court having jurisdiction in Admiralty matters, is given a jurisdiction which is different and distinct from that vested in the Exchequer Court by the *Exchequer Court Act*.

Section 18, Subsection 1 of the *Admiralty Act* provides that, subject to what is elsewhere contained in the Act, the Admiralty Court shall have the same jurisdiction over "like places, persons, matters and things" as the Admiralty jurisdiction now possessed by the High Court of Justice in England, and subsection 2 of the same section provides that "without restricting the generality of subsection (1) of this section, and subject to the provisions of subsection (3) thereof, Section 22 of the *Supreme Court of Judicature (Consolidated) Act* 1925 of the Parliament of the United Kingdom, which is Schedule A to this Act, shall, insofar as it can, apply to and be applied by the Court, *mutatis mutandis*, as if that section of that Act had been by this Act re-enacted, with the word 'Canada' substituted for the word 'England' etc. . . ."

Subsection 3 of Section 18 of the *Admiralty Act* gives the Admiralty Court jurisdiction to hear and determine (1) "any claims arising out of an agreement relating to the use or hire of a ship" and a similar provision is contained in Section 22 of the *Supreme Court of Judicature (Consolidated) Act* 1925.

Moreover actions *in personam* have for many years lain to enforce claims of the nature of that which forms the basis of the present action, against the Crown or its agencies. (*Halsbury Statutes of England*, 2nd Edit. Vol. 6, page 47—Footnote to Section 1 of the *Crown Proceedings Act*)

As above noted the defendants filed separate pleas. The defence relied upon by the defendant Blouin is two fold: *a*) that he was not a party to the contract of affreightment, since he did not sign the charterparty (Produced as Exhibit P. 5) and to the knowledge of the plaintiff acted throughout solely as the agent of the defendant Commission; and *b*) that, in any event, the plaintiff's vessel was discharged with all due dispatch at Forestville, having regard to the time of her arrival and the prevailing circumstances.

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I find no satisfactory evidence to support the allegation that Blouin contracted merely as the agent of the defendant Commission. On the contrary the weight of the evidence is that the contract of affreightment was between the plaintiff and the said Blouin personally.

Although the said charterparty was not signed by the defendant Blouin he is named therein as the charterer and it was admitted that this document, which was prepared by the plaintiff, was handed to Blouin on the understanding that Blouin would sign and return it to the plaintiff, which however he failed to do. Blouin admitted that the said charterparty was in fact the contract between the parties. The following question was put to him by his counsel;

> Q. There was produced this morning as exhibit, I think, P-5 a charter party bearing the signature of Langlois as owner. Is it the contract which intervened between you and Savoy Shipping Limited?
>
> A. Yes, sir. (Page 45)

Moreover Blouin admitted that there was a further and supplemental agreement entered into between him and the plaintiff in accordance with which the amount of hire for the vessel was increased over the sum mentioned and a still further agreement that the vessel would be discharged immediately following her arrival at Forestville. It is true that Blouin sought to qualify this latter promise by stating that it was given subject to the vessel's arrival at Forestville on Tuesday, December 27, 1954. This condition was categorically denied by the plaintiff's representatives and I have serious doubts that Blouin's testimony on this point should be relied upon. He testified that this promise to unload the vessel on her arrival at Forestville, provided that she arrived there on Tuesday, December 21, was given Saturday evening December 18. However it must at that time have been obvious that the vessel would not be loaded before Tuesday at the earliest and that therefore she could not possibly reach Forestville by Tuesday; and it would have been nonsense to have agreed to unload her immediately upon her arrival at Forestville provided she arrived there on Tuesday.

I conclude therefore that Blouin contracted with the plaintiff in his own name and that he expressly agreed that the plaintiff's ship would be immediately discharged after her arrival at Forestville and that the sole remaining

question is whether or not the undertaking on behalf of the defendant Blouin, as charterer, and of the defendant Commission, as consignee, was carried out.

In the absence of any stipulation in the charterparty as to the lay-days to be allowed for unloading it was the obligation of Blouin, in virtue of his said undertaking and of the defendant Commission as consignee who accepted the cargo, to employ all reasonable diligence in unloading the vessel upon her arrival at Forestville. (Scrutton on *Charter Parties,* 15th Edit., p. 353 *et seq.* and p. 363; C.C. 2458 *et seq.*)

The proof shows that the M/V *Savoy* reached Forestville at approximately 3:00 o'clock in the afternoon of December 24. The defendant Blouin knew when the *Savoy* would reach Forestville and had, in fact, advised the representatives of the defendant Commission as to the time of her arrival. Moreover, due notice of her arrival and readiness to discharge was given by the plaintiff to the defendant Commission. In spite of this, unloading was not commenced until 7 a.m. on December 27, 1954, and was only completed at 8 P.M. on December 28, with the result that the vessel could not leave Forestville until the morning of the 29th. Does the proof justify the conclusion that the vessel was unloaded with all reasonable diligence?

Although the evidence as to the time it would normally have taken to discharge the said cargo was contradictory, I consider that it justifies the conclusion that the normal time required would have been approximately 15 hours.

The defendants contend that having regard to the fact that the vessel reached Forestville only on the afternoon of the day preceding Christmas, and considering the difficulty in securing personnel during the holiday period and the prevailing weather conditions, the ship was unloaded in due time and with reasonable dispatch.

Defendants brought considerable evidence with a view of establishing that according to the custom or usage prevailing at Forestville no stevedoring work is done at that port on the afternoon of December 24, or on Christmas day (which in this case was a Sunday). This evidence was taken under reserve of the objection that no such

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custom or usage had been alleged and, in my opinion, this objection is well founded. The only allegation which it was suggested might have relevancy to this point was that contained in Paragraph 41 of the plea of the defendant Commission, which reads as follows:

41. Les 25 et 26 décembre 1954 étaient des jours fériés et d'inactivité pour les quais, spécialement celui de Forestville.

I do not believe that this allegation is an allegation of custom or usage. It is not alleged that such was the custom or usage but is merely stated that in the year 1954 the 25th and 26th of December were holidays on the quais generally and specially at Forestville. It is not alleged whether or not this was in consequence of an order or regulation and certainly it is not alleged that stevedoring work was barred on those days by reason of a long established practice and custom.

Not only is there nothing in the plea to justify the admission of evidence as to the custom or usage argued for at the trial but, in my opinion the evidence heard falls short of establishing the existence of any such custom. (*Scrutton* on *Charter Parties*, 15th Edit. p. 26)

It remains to consider whether or not the *Savoy* was in fact unloaded with reasonable diligence having regard to the circumstances. In considering this question, I believe that I must make reasonable allowance for prevailing weather conditions, and the difficulty, which undoubtedly existed, of obtaining personnel at Forestville on December 24 and 25. However, after taking all of these factors into consideration, I am convinced that the time taken to unload the *Savoy* was unreasonable and exceeded the time that it would have taken to discharge her.

Making reasonable allowance for the adverse weather conditions which prevailed and the difficulties involved in securing stevedoring personnel during the holiday season, I am of the opinion that the vessel should have been completely unloaded not later than December 27, 1954, and that she was detained for a period of 24 hours in excess of the time required to unload her if reasonable diligence had been exercised.

The proof shows, and it was admitted, that the expenses of maintaining ship and crew at that time of year totalled the sum of $220.50 per day, and I conclude that the plaintiff has established its right to recover this sum from the defendants jointly and severally.

I find however that the plaintiff's claim for compensation for alleged loss of profit has not been made good. The proof shows that the trip to Forestville was to be her last voyage of the season, after which she was destined to be laid up for the winter, and there is no evidence to justify the conclusion that she would have earned at profit even if she had been unloaded at Forestville on December 27, 1954, as she should have been.

The plaintiff's action will therefore be maintained and the defendants be condemned jointly and severally to pay to the plaintiff the sum of $220.50 with interest and costs.

Judgment accordingly.