[MALACHTOS, J.]

GRADE ONE SHIPPING LTD., OWNERS OF THE CYPRUS SHIP "CRIOS II" (NO.2),

Plaintiffs,

v.

THE CARGO ON BOARD THE SHIP "CRIOS II", NOW LYING IN THE PORT OF LARNACA,

Defendant.

(*Admiralty Action No* 83/76).

Admiralty–Charterparty–Bill of Lading–Stamped "freight prepaid" and no terms of the charterparty incorporated therein–Ship owners do not have a maritime lien on the cargo, either at common law or ex contractu.

Admiralty–Arrest of property (cargo)–Order of arrest issued on insufficient grounds–Discharged.

On the 26th November, 1975, the plaintiffs, as owners of the ship "CRIOS II" and the Italian firm Intermediterranea S.R.L. of Genova entered into a voyage charter for the carriage of general cargo from Venice and Rijeka to Jeddah of Saoudi Arabia for a lump sum freight of U.S. Dollars 280,000 payable within five working days from signing of bills of lading at each port.

The master of the ship issued several bills of lading for the cargo loaded on board the said ship which were described as "*freight prepaid*".

It was the allegation of the plaintiffs that the charterers by false pretences and/or fraudulently and/or by misrepresentations managed to take the bills of lading which contained the phrase "freight prepaid" without paying any amount to the account of the plaintiffs as agreed in the charterparty; and by an action, filed on the 9th June, 1976 they prayed, *inter alia*, for a declaration that they were entitled to a lien on the cargo in respect of freight, demurrages and for loss of earnings and employment of the ship and expenses. At the same time on an *ex parte* application based on rule 50 of the Cyprus Admiral-

ty Jurisdiction Order, 1893, accompanied by affidavit, plaintiffs obtained an Order for the issue of a warrant of arrest of the cargo on board the said ship lying at the time in the port of Larnaca

On the 1st July, 1976, when the case was fixed for further directions, an appearance was entered on behalf of the cargo owners who disputed the claim of the plaintiffs as well as the order of arrest of the cargo and by a subsequent application supported by affidavit applied for the discharge of the order of arrest and release of their cargo

Applicants cargo-owners contended that no action in rem lies against the defendant cargo and so the warrant of arrest of such cargo could not be issued

On the other hand the plaintiffs referred to clause 8 of the charterparty, which provided that the ship owners shall have a lien on the cargo for freight, dead freight, demurrage and damages for detention, and submitted that they have a lien on the cargo both *ex contractu* as well as at common law

It being clear that the applicants-cargo-owners were holders of bills of lading stamped "freight prepaid' and the fact that the freight was prepaid was verified by a letter of the charterers dated 16th January, 1976, the simple question to be resolved by the Court was whether the plaintiffs had a maritime lien as against the applicants either at common law or *ex contractu*

Held (1) no doubt at common law the shipowners have a lien on the cargo for freight irrespective of any contract but such lien does not exist in cases of freight prepaid If the bill of lading represents that freight has been prepaid the shipowners cannot, as against the assignee of the goods who has given value for them on the faith of that representation say afterwards that it has not been paid He can neither sue the assignee for that freight nor set up a lien for it as against him (See *Howard & Others* v *Tucker & Others* [1831] 1 B & Ad 712, 109 English Reports p 951)

(2) A shipowner's lien under a charterparty may be modified by the bills of lading which have been given for the goods (see British Shipping Laws, 12th ed Vol 3 paragraph 1349 and pp 360–361 *post*)

(3) The plaintiffs have no maritime lien on the cargo, either

at common law or *ex contractu*, as the bills of lading were stamped "freight prepaid" and no terms of the charterparty were incorporated therein.

(4) The order for the arrest of the cargo was issued on insufficient grounds and is hereby discharged.

Order accordingly.

Cases referred to:

Howard and Others v. *Tucker & Others* [1831] 1 B. & Ad. 712 (109 E.R. p. 951);

Gardner & Sons v. *Trechmann* [1885] 15 Q.B.D. 154;

Foster v. *Colby* [1859] 28 L.J. Ex. 86 (157 E.R. p. 651).

Application.

Application by the cargo owners for the release of the defendant cargo which had been arrested by Order of the Court on an *ex parte* application by plaintiffs.

C. Erotokritou with *E. Psillaki* (*Mrs.*), for the applicants (cargo owners).

L. Papaphilippou, for the respondents (plaintiffs).

The following judgment was delivered by:–

MALACHTOS, J.: The plaintiffs in this Admiralty Action are a private company formed and incorporated in Cyprus under the Companies Law, Cap. 113, with limited liability and are the owners of the ship "CRIOS II". On the 9th June, 1976 they instituted legal proceedings claiming:

1. A declaration of the Court that the plaintiffs are entitled to a lien on the cargo on board the ship "CRIOS II" in respect of freights, demurrages and for loss of earnings and employment of the ship and expenses.

2. An Order of the Court enforcing the plaintiffs' lien against the cargo on the ship "CRIOS II" by selling the cargo by public auction or private agreement.

3. Judgment for the equivalent in U.S. Dollars 286,095.79 for freight, demurrages and/or damages and expenses by virtue of a charterparty dated 26th November, 1975, and/or the same amount for breach of the terms and conditions of the said charterparty and/or for fraud and/or misrepresentations and/or deceit and/or otherwise.

4. Further damages for loss of use of the said ship from 6.6.76, onwards; and

5. Interest and costs.

At the same time on an *ex parte* application based on Rule 50 of the Cyprus Admiralty Jurisdiction Order 1893, accompanied by affidavit, the plaintiffs obtained an Order for the issue of a warrant of arrest of the cargo on board the said ship lying at the time in the port of Larnaca. This Rule reads as follows:

" 50. In an action in rem any party may at the time of, or at any time after the issue of the writ of summons, apply to the Court or a Judge for the issue of a warrant for the arrest of property."

The facts which gave rise to the present dispute appear in the affidavit and the documents attached thereto, sworn on behalf of the plaintiffs–respondents, by one of their employees, namely, Jean Diakakis dated 9.6.76. These facts are as follows:

On the 26th November, 1975, the plaintiffs, as owners of the ship "CRIOS II" and the Italian firm Intermediterranea S.R.L. of Genova entered into a voyage charter for the carriage of general cargo from Venice and Rijeka to Jeddah of Saoudi Arabia for a lump sum freight of U.S. Dollars 280,000 payable within five working days from signing of bills of lading at each port by payment in owners' favour to the Bank of Switzerland, Geneva. Further, by the same above charterparty the demurrage was agreed at loading at U.S. Dollars 2,250 per day. By an addendum to the said charterparty the parties agreed that the loading port of Venice be changed to Marina di Carrara and Pozzuoli and for this variation the charterers agreed to pay to the plaintiffs together with the freight an additional amount of U.S. Dollars 5,000. Furthermore, it was agreed that in addition to the port of Jeddah the ship of the plaintiffs would call to a second port for the discharge of part of the cargo, namely, Hodeidah of Yemen and for this second call the charterers agreed to pay to the plaintiffs an additional amount of U.S. Dollars 50,000.

It was also agreed by the said addendum that as the ship had to call Hodeidah after her turn to Jeddah to continue waiting as per turn number already registered in case that due to Hodeidah call the vessel would lose her turn, the charterers

would start paying day by day the plaintiffs' bank at Geneva the amount of 2,250 dollars for every day lost for the second turn.

The said ship, in compliance with the above charterparty, loaded the cargo in question according to the instructions of the charterers from Marina di Carrara, Pozzuoli and Rijeka and completed her voyageable. She first called at Jeddah port where she registered her turn for berthing and thereafter went to Hodeidah where she discharged the cargo which was destined for that port. Thereafter she returned to Jeddah where she was waiting to berth.

The master of the ship issued several bills of lading for the cargo loaded on board the said ship which were described as "freight prepaid". These bills of lading were delivered to the ship's agents with specific written instructions not to be delivered to the charterers or shippers unless and until the said ship's agents are shown written evidence that freight and demurrages and other amounts due thereon were paid. The ship's agents at Marina di Carrara and Pozzuoli, as it appears from the relevant letters to them by the master of the ship dated 30.12.75 and 7.1.76, were Trimar Shipping Agency and Navigor Shipping Services respectively.

Only two of the bills of lading No. 15 and 20 were providing that the freight was payable at destination. However, the freight for these two bills was not paid at destination.

It is the allegation of the plaintiffs that the charterers by false pretences and/or fraudulently and/or by misrepresentations managed to take the bills of lading which contained the phrase that freight was prepaid without paying any amount to the account of the plaintiffs as agreed in the charterparty. This is clear from a letter dated 16.1.76 addressed by the charterers to Grand Pale Shipping Co. of Pireus, Greece, agents of the plaintiff company. This letter reads as follows:

> "We declare hereby that we managed to take delivery of complete sets of Bill of Lading (original) from agents, concerning shipments of Marina di Carrara and Pozzuoli on presentation of false bankers letter confirming remittance of freight involved.
>
> Now we have to state that above remittance never has been effected although we have collected freight from shippers.

We undertake to pay immediately all amounts due by us, in order to solve this matter.

Also we declare that the way acted to collect the original Bill of Lading from agents was not correct being on false pretences.

And for above we take full responsibility and consequences."

The aforesaid charterparty by clause 8 provides that the owners shall have a lien on the cargo for freight, dead freight, demurrage, and damages for detention. The charterers shall remain responsible for dead freight and demurrage (including damages for detention) incurred at port of loading and shall also remain responsible for freight and demurrage (including damages for detention) incurred at port of discharge, but only to such an extent as the owners have been unable to obtain payment thereof by exercising the lien on the cargo.

It is the contention of the plaintiffs that they have an ex contractu lien on the cargo, subject matter of the present application.

On the 1st July, 1976, when the case was fixed for further directions by the Court, an appearance was entered on behalf of the cargo owners who disputed the claim of the plaintiffs as well as the Order of arrest of the cargo.

On the 21st July, 1976, seven of the cargo owners filed an application for the discharge of the order of arrest and release of their cargo. Similar applications were filed by the rest of the cargo owners at a later stage. It should be noted here that for the cargo loaded at Marina di Carrara bills of lading numbering 1 to 27 were issued and bills of lading numbering 1 to 9 were also issued for the cargo loaded at Pozzuoli. These proceedings concern all the bills of lading described as "freight prepaid" as it was agreed between the parties that any subsequent application will follow the result of the application filed on 21.7.76.

In the affidavit in support of the application the main allegation of the applicants is that the freight alleged to be due and owing to the plaintiffs, even if correct which is denied, is due under the terms of the voyage charter dated 26.11.75 between the plaintiffs and the Intermediterranea S.R.L. of Genova, by

the charterers. The charterers were neither the shippers nor the consignees of the cargo, nor the endorsees of the bills of lading. The shipper took clean bills of lading in which no mention of the voyage charter was made, nor they incorporate in any way the terms of the voyage charter, and neither the shippers nor the endorsees and consignees of the bills of lading knew or could have known of the existence of the said voyage charter. Upon the issue of the bills of lading in question a new contract had in fact sprang up between the shipowners and the consignees upon the terms of the bills of lading and what can be claimed by the plaintiffs against the cargo owners who are endorsees of the bills of lading is only what is due, if any, under the contracts shown by the bills of lading. Since nothing is due under the bills of lading, which are marked "freight prepaid", the plaintiffs have no lien on the cargo.

The plaintiffs opposed the application of the cargo owners and in the relevant affidavit in support of the opposition dated 19.8.76, adopt all the allegations contained in the affidavit of Jean Diakakis, of the 9.6.76. So, when this application came on for hearing on the 28th August, 1976, this Court was called upon to decide on the narrow issue as settled by the affidavits in support of the application and opposition, as to whether the respondents-plaintiffs have any maritime lien on the cargo, as the bills of lading concerning the said cargo were stamped "freight prepaid" and the applicants were the consignees of the cargo and holders of the bills of lading for value.

Counsel for applicants argued that no action in rem lies against the defendant cargo and so the warrant of arrest of such cargo could not be issued; that the plaintiffs did not establish a cause of action against the defendant cargo and that the facts of the case, as set out in the affidavit of Jean Diakakis dated 9.7.76, on the strength of which the order for arrest of the cargo was issued, do not support the cause of action appearing in the writ of summons. The plaintiffs based their claim all along on the charterparty dated 26.11.75 between the plaintiffs and the Intermediterranea S.R.L. the charterers, who have no connection with the defendant cargo neither as shippers nor as cargo owners. The plaintiffs admit that they have issued bills of lading in respect of the cargo and they allege that these bills of lading were taken by the charterers by fraudulent misrepresentation as it appears in the letter of the charterers addressed to them dated 16.1.76. This is the fraud relied upon as invalidating the bills of lading.

Even if the facts referred to in the affidavit of Diakakis which are denied, are true, then again the plaintiffs can have no redress against the applicants cargo owners since nobody can dispute the fact that they have paid for obtaining the bills of lading in good cash money.

On the other hand, counsel for the respondents submitted that the respondents have a maritime lien on the cargo both under the terms of the charterparty, particularly term No. 8, as well as at common law. He also put forward the allegation that the bills of lading which the applicants are holding are false as they were not signed by the master of the ship in accordance with the terms of the charterparty. This allegation was put forward as a result of a supplementary affidavit sworn on behalf of the applicants on 1.9.76 and filed by consent in the course of the hearing of this application on 14.9.76 and to which photo copies of two bills of lading concerning cargo loaded at Marina di Carrara were attached. In the said affidavit it is stated that all the other bills of lading, as regards cargo loaded at Marina di Carrara are similar. These bills of lading, although stamped "freight prepaid" were not signed by the master but by Trimar as agents. Neither Trimar nor Navigor had authority to issue bills of lading and in any case, they were not the agents of the shipowners but agents of the charterers. He further submitted that the allegation of the applicants that they are *bona fide* holders of bills of lading in this case cannot stand taking into consideration the facts of this case as the charterers took possession of the said bills of lading by fraud as it appears from their letter dated 16.1.76 addressed to Grand Pale Shipping Co. of Pireus, agents of the plaintiff company. This letter proved that the charterers collected the freight from the shippers as their agents. Counsel for the respondents also submitted that the applicants have to prove that they are the owners of the cargo in question.

To substantiate the above allegations the respondents called as a witness Captain Demetrios E. Lestos, master of "CRIOS II" at the material time. This witness in giving evidence stated that he arrived at Marina di Carrara on 15.12.75 and on the same day a certain Donati of Trimar Agency went on board and he was given by the Captain notice of readiness together with blank bills of lading of Grand Pale Shipping Co. in order to fill them up, and bring them back to him for signature. The loading was completed on 31.12.75 and Mr. Donati went on

board and presented bills of lading of his own firm. The Captain refused to sign them because they were not in the forms he gave him. However, he kept the Captain's copy as well as the agents' copy and returned the originals to him to replace them with those of the Grand Pale Shipping Co. He also gave him the letter of 30.12.75, to which reference is made earlier in this judgment. The bills of lading which he rejected are similar to the bills of lading attached to the affidavit of 1.9.76 filed on behalf of the applicants on 14.9.76. He further stated that he left Marina di Carrara without signing any bills of lading and he agreed with the said Donati to fill in the bills of lading of Grand Pale Shipping Co. he had already given him and despatch them to the port of Pozzuoli where the ship had to call next. The master then proceeded to Pozzuoli where the loading of the cargo from that port was completed on 15.1.76. After the completion of the loading a certain Mr. Banzini from Navigor and a certain Mr. Sodano from the charterers, went on board and gave him the bills of lading from Marina di Carrara and Pozzuoli completed. The Captain signed them all and gave them to Mr. Banzini of Navigor who gave him a receipt. This receipt has been produced as *Exhibit Z* in these proceedings.

This witness also stated that on 16.1.76 he left Pozzuoli. On arriving at Jeddah he notified the consignees of the goods under bills of lading No. 15 and 20 through the shipowners agents there, for payment of the freight as the freight concerning these two bills was payable at destination, but they failed to pay. All the other bills of lading signed by him were stamped "freight prepaid". But this freight was not paid and that is why he gave to Trimar and Navigor the letters of the 30.12.75 and 7.1.76. Finally, he stated that he arrived at Larnaca port on 6.6.76 and the discharge of the cargo was completed on 28.6.76. For the discharge of the cargo in view of the fact that the cargo manifest did not contain particulars as to the weight, measurements and marks, he delivered to Messrs. Frangoudhi and Stephanou, a shipping firm appointed by this Court to discharge the cargo on board the said ship, a set of the bills of lading which were brought to him by Trimar for signature at Marina di Carrara and he had rejected.

I must say from now that for the purposes of this application I discard the evidence of this witness, which is in direct contradiction with the facts contained in the affidavit of Jean Diakakis of 9.6.76 and the documents attached thereto, on

which the Order for arrest of the cargo was granted. What strikes me peculiar in this case is the fact alleged by the witness that he did not have the master's copy of the bills of lading signed by him when he arrived at Larnaca port for the unloading of the cargo and he delivered to Frangoudhi and Stephanou a set of bills of lading which were issued by Trimar. This strengthens the allegation of the applicants that the story told by the witness as regards the issue of bills of lading at Marina di Carrara is an afterthought. Furthermore, it is also peculiar the fact that although the plaintiffs must have had knowledge of the fraud committed by the charterers since January, 1976, as it appears from the letter of the charterers dated 16.1.76, yet, there is no evidence that they took any steps to secure their claim or to notify either the shippers or the consignees of the goods. However, for the purposes of this application it makes no difference whether the bills of lading for the cargo loaded at Marina di Carrara were signed by the master or Trimar as agents, as bills of lading may be signed by the master or the ship's agents.

It is clear from the affidavits in support of the application and the opposition that Trimar and Navigor were agents of the shipowners at Marina di Carrara and Pozzuoli respectively. It is also clear that the applicants are holders of bills of lading stamped "freight prepaid" and the fact that the freight has been prepaid is verified by the letter of the charterers dated 16.1.76. There is no allegation that in the bills of lading any conditions of the charterparty were incorporated.

The simple question to be answered in these proceedings is whether on the above facts the respondents have a maritime lien on the cargo as against the applicants either at common law or ex contractu.

No doubt at common law the shipowners have a lien on the cargo for freight irrespective of any contract but such lien does not exist in cases of freight prepaid as in the present case.

If the bill of lading represents that freight has been paid the shipowner cannot, as against the assignee of the goods who has given value for them on the faith of that representation, say afterwards that it has not been paid. He can neither sue the assignee for that freight nor set up a lien for it as against him. This proposition is supported by the case of *Howard & Others* v. *Tucker and Others* [1831] 1 B & Ad. 712, (109 English Reports page 951) where the facts were as follows:

"Goods being shipped in India for London, on account of a person there, the bill of lading was forwarded to him, and he indorsed it over for value. The bill of lading, signed by the captain, stated the freight to have been paid in Bengal, but it was found, after the above transfer, that the freight never had been paid, through default of the shipper: Held, that the ship-owners, who detained the goods, could not claim payment of the freight from the assignees of the bill of lading."

As regards the operation of charterparty liens against bills of lading holders, useful reference may be made to the British Shipping Laws, 12th edition, volume 3, paragraph 1349 where we read:

"The shipowner's lien under a charterparty may be modified by the bills of lading which have been given for the goods. As regards the charterer himself, the terms of a bill of lading, given to him for goods which he has shipped, do not alter the contract with him. The charterparty is still the contract. The master has not authority to qualify it. But as regards third persons, not parties to the charter, the terms of the bill of lading may greatly change the shipowner's powers over the goods. If the bill of lading has been given with the shipowner's authority, or by the master acting within the scope of his ordinary apparent authority, and if goods have been shipped or purchased from shippers upon the faith of it, the shipowner cannot avail himself of rights given by the charterparty but not indicated in the bill of lading, to the prejudice of the shipper or purchaser. He is precluded from contradicting the terms of the bill of lading.

Thus he cannot claim a lien for more freight than is reserved by the bill of lading, against a shipper or purchaser who is a stranger to the charterparty, and has taken the bill of lading without notice of it; though by the charterparty itself the owner may have stipulated for a lien on all goods shipped, for the whole charter freight."

In *Gardner and Sons* v. *Trechmann* [1885] 15 Q.B.D. 154:

"A charterparty contained a stipulation in the usual form for payment of freight at the rate of £1.11s.3d. per ton; it also contained a clause that the shipowner should have 'an absolute lien on the cargo for freight, dead freight,

demurrage, lighterage at port of discharge, and average;' and a further clause that the captain was to sign bills of lading at any rate of freight; 'but should the total freight as per bills of lading be under the amount estimated to be earned by this charter, the captain to demand payment of any difference in advance'. Certain goods were put on board the chartered ship, and were made deliverable to the plaintiffs (who were not the charterers) by a bill of lading, whereby freight was made payable at 22s.6d. per ton: the bill of lading contained also a clause, whereby it was provided that extra expenses should be borne by the receivers and 'other conditions as per charterparty.' Upon the arrival of the ship at the port of discharge the defendant, who was the shipowner, claimed and compelled payment of freight at the rate mentioned in the charterparty. The plaintiffs having sued to recover back the difference between the freight as specified in the charterparty and the freight as specified in the bill of lading:–

Held, that the bill of lading did not incorporate the stipulation in the charterparty as to the payment of freight, that no right of lien existed for the freight mentioned in the charterparty, and that the plaintiffs were entitled to delivery of the goods upon payment of the freight specified in the bill of lading."

In *Foster* v. *Colby* [1859] 28 L.J. Ex.86 (157) English Reports 651 Pollock C.B. had this to say at page 655:

"But I prefer to rest my judgment on this ground, that a bona fide indorsee of a bill of lading having no notice whatever of any charterparty, or any other freight to be paid except that which is expressed in the bill of lading, and not colluding with any persons to get an advantage that he is not entitled to, is entitled to the goods, on payment of the freight stipulated in the bill of lading."

It is clear from the above that the respondents have no maritime lien on the cargo, the subject matter of the present proceedings, either at common law or ex contractu, as the bills of lading were stamped "freight prepaid" and no terms of the charterparty were incorporated therein.

The Order of this court issued on the 9th June, 1976, for the arrest of the said cargo, was, therefore, issued on insufficient

grounds and is hereby discharged, after, of course, payment of all fees dues and charges incurred in respect of the arrest and custody thereof. Needless to say that the discharge Order affects only the cargo under the bills of lading stamped "freight prepaid".

Order accordingly.