[ZEKIA, J. and ZANNETIDES, J.]

GEORGE S. GALATARIOTIS & SONS LIMITED

Appellants (Defendants)

v.

ATLAS LEVANTE-LINIE, A.G. of Bremen

Respondents (Plaintiffs).

(Civil Appeal No. 4247)

1958
March 1,
May 29

GEORGE S. GALATARIOTIS & SONS LTD.
v.
ATLAS LEVANTE-LINIE, A.G.

Charterparty—Lay Days — Demurrage contract — Delay — Liability — Onus of proof whether delay is due to the fault of ship-owners—It rests on the charterers—Risks on shippers.

The Appellants-Shippers booked a space in one of the Respondents' ships for carrying a cargo of barley from Cyprus to Cardiff and Avonmouth. The terms of the agreement material to the case were :-

(a) The shippers undertake to load 500 tons per weather working day Christmas and Boxing day excepted but to count if used.

(b) Shipment to be made according to Liner terms. Laydays were eventually extended to the 24th December, 1953.

(c) Demurrage £300 daily or *pro rata.*

The Appellants were able to bring alongside the ship, ready for loading, 500 tons of barley each weather working day, and even more. Had the loading proceeded at the rate of 500 tons daily the shipment would have been completed within the lay days. There had been, however, a delay of 3 days and 11 hours due to the trimming operations on board the ship, which were the exclusive responsibility of the ship-owners-Respondents. The demurrage payable—if it was payable at all—for this period of delay amounted to £1037 which the Respondents claimed from the Appellants by an action instituted in the District Court of Limassol.

The trial Court held : (1) that, in the absence of any exception in the charter-party to the contrary, the charterers are liable for the demurrage unless they could show that the delay was due to the fault of the ship-owners ; and that, therefore, in this case the onus was on the charterers to show that the trimming was carried out properly ; (2) that the charterers failed to discharge this burden and, consequently, they are liable to pay the demurrage claimed with costs.

It was argued on behalf of the Appellants : (1) that they were not answerable for the delay inasmuch as it was occasioned by the trimming operations on board the ship, such operations being the exclusive responsibility of the ship-owners, Respondents ; (2) that the Respondents were negligent in carrying out those operations because they did not employ an adequate number of labourers for stowing or because the trimming was not done at such times as not to impede the loading by the shippers ; (3) that the trial Court misdirected itself in holding: (a) that the onus rested on the shippers to show that the ship-owners had not carried out the trimming properly; (b) that there was no evidence that they (the ship-owners) did not act reasonably. The Supreme Court, affirming the judgment of the Lower Court,

Held : (1) The Lower Court was right in holding that, in the absence of any exception provided in the charterparty, the shippers could not escape liability to pay demurrage unless they could show that the delay was due to the fault of the ship-owners.

Budgett and Co. v. *Binnington and Co.* (1891) 60 L.J. Q.B. 1, *per Lord Esher, M.R.* and *Lopes, L.J.*, at pp. 4—5, 7, respectively, *followed.*

(2) The finding of the trial Court that the shippers had no discharged this burden was supported by sufficient evidence. Had the onus been on the ship-owners to show affirmatively that they carried out the trimming operations reasonably fast and in a proper way, then one might say that the evidence was not sufficient or strong.

(3) Stowing and trimming of the cargo on board the ship is part of the process of loading. Loading necessarily comprises a joint operation by the shipper and the ship-owners.

Argonaut Navigation Co. Ltd. v. *Ministry of Food* (1949) 1 All E.R. 160, at p. 164 per *Bucknill, L.J., followed.*

(4) If both parties act reasonably in discharging their share in the work and yet there is delay beyond the anticipated date or laydays then unless the shipper is covered by any exception provided in the charter party he is liable to pay demurrage and this is not because he is negligent in performing his part but because the risk in the circumstances and under the contract falls on him.

William Alexander and Sons v. *Aktieselskabet Dampskibet Hansa* (1920) A.C. 88, at p. 93, per *Lord Finlay, followed.*

Appeal dismissed.

Cases referred to :

Budgett and Co. v. *Binnington and Co.* (1891) 60 L.J. Q.B. 4;

Argonaut Navigation Co. Ltd. v. *Ministry of Food* (1949) 1 All E.R. 160 C.A. ;

William Alexander and Sons v. *Aktieselskabet Dampskibet Hansa* (1920) A.C. 88.

1958
March 1,
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GEORGE S. GALATARIOTIS & SONS LTD.
v.
ATLAS LEVANTE-LINIE, A.G.

Appeal.

Appeal by the Defendants, the shippers, against the judgment of the District Court of Limassol (Zenon, P.D.C. and Kakathymis, D.J.) dated the 24th December 1957 (Action No. 1381/56) whereby the Defendants were held liable to pay demurrage in the sum of £300 per day for three days and eleven hours, *pro rata*, viz. £1037.500 mils with costs.

Sir Panayiotis Cacoyiannis for the Appellants.

John Clerides, Q.C., for the Respondents.

Cur. Adv. Vult.

The facts sufficiently appear in the judgment of the Court delivered by :

ZEKIA, J. : The appellants, the shippers in this case, are exporters. The respondents are ship-owners who through their agents in Cyprus agreed to book a space in one of their ships for carrying a cargo of barley, 4000 tons, from Cyprus to Cardiff and Avonmouth. The terms of the agreement are embodied in three booking notes plus in a document which contains additions and amendments to the said notes. The terms material to the present case were—

(a) The shippers undertake to load 500 tons per weather working day Christams and Boxing day excepted but to count if used.

(b) Shipment to be made according to Liner terms. Lay-days were eventually extended to the 24th December, 1953.

(c) Demurrage £300 daily or *pro rata*.

Loading started on the 26.12.53 and was completed on the 7th January, 1954. The quantity loaded was 3,947 tons. Had loading proceeded at the rate of 500 tons per day, the shipment would have been over by 4 days and 8 hours earlier than the time it actually took. The ship-owners at the trial reduced the period of delay to 3 days and 11 hours by agreeing to a deduction claimed. The demurrage payable for this period of delay—if it is payable—amounted to £1037.500 mils. The trial Court found that the ship-owners were entitled to this sum and accordingly adjudged appellants to pay the said sum with costs. The charterers appealed against this judgment on the ground that they were not answerable for the delay which was occasioned by the

trimming operations on board the ship, such operations being the exclusive responsibility of the ship-owners, that the shippers daily had 500 tons or more barley available alongside the ship ready for loading, a fact which was not disputed but the ship refused to receive the daily amount stipulated and that the shippers having performed their part fully, they were discharged of any responsibility.

The second ground was that the ship-owners were negligent in carrying out the trimming operations inasmuch as they did not employ an adequate number of labourers for stowing, or the trimming was not done at such times as not to impede the loading by the shippers.

The 3rd ground was that the Court misdirected itself in holding (a) that the onus of proof rested on the shippers to show that the ship-owners had not carried out the trimming operations properly and (b) that there was no evidence that they (1) did not act reasonably in showing the cargo in the holds of the ship.

The trial Court found as follows :—

> "From the evidence before us we may at once say that we are satisfied that the defendants were able to bring alongside the ship, ready for loading, 500 tons of barley each weather working day, and even more.
>
> If the loading was not completed within the time specified by the Booking Notes, this was due to the trimming operations on board ship, after the third day of loading, which is the responsibility of the ship-owners".

Further down in the judgment it is stated :—

> "In the present case, trimming of a cargo of bulk barley is a necessary operation for the benefit of the ship and of the cargo, and the charterer, on the authorities cited, is liable to pay the demurrage when the lay days run out, unless he can show that the trimming operations were delayed by the fault of the ship-owners or the persons employed by them. The onus of proof is on the charterer, and not on the ship-owners to show that the trimming was carried out properly".

With reference to the complaints made by the appellants

(1) i.e. the ship-owners.

as to the trimming operations not proceeding satisfactorily the Court said: "They also complain that if the trimming had been carried out in such a way as not to prevent them in their loading operations, they would have completed the shipment even earlier than in the time agreed. The defendants have not adduced any evidence before us in order to substantiate their allegations in those two letters. That is to say, that a considerable time was lost in trimming due to the fault of the plaintiffs, or that the plaintiffs were unable to improve the position in the ship's holds, or that the trimming was not carried out in a proper way. On the contrary, from the evidence of Mr. Ieropoulos, Manager of the Amathus Navigation Company, who are the plaintiffs' agents in Cyprus, we are satisfied that the ship owners have employed the number of labourers usually employed in Cyprus for trimming operations, and in the absence of any evidence to the contrary we assume that the trimming was done in the way which is usual to Famagusta Port".

There was only one witness called in this case and that was the agent of the respondents. The rest of the evidence is documentary in character. There is nothing in the evidence to suggest that the trimming operations were not carried out properly or that no adequate number of labourers were employed in such operations. On the contrary the agent deposed that on the occasion he was present on board the ship the work of stowing was properly done and the number of labourers employed was quite adequate.

If the case was that the ship-owners had to prove affirmatively that they carried out the trimming operations reasonably fast and in a proper way, then one might say that the evidence was not sufficient or strong. But on the authorities cited and relied upon by the Court below it was up to the shippers after the expiration of the lay days to show that they were not liable to pay demurrage *viz.* to prove an exception or default on the part of the ship-owners. In *Budget & Co.* v. *Binnington & Company* (1) (a case where the strike of the labourers prevented the ship-owners to unload the cargo, whereupon the freighter denied liability to pay demurrage) Lord Esher said at p. 4:—

"It has been decided that a demurrage contract in which

(1) (1891) 60 L.J. Q.B. 1.

the days are fixed is a contract by the freighter that if the ship is detained beyond the specified number of days allowed as running days and demurrage days, he will pay demurrage in respect of any days during which the ship is detained over and above the days mentioned. It has been decided over and over again, and been stated in terms, that such a contract is an independent and absolute contract, and the Judges who used the term "absolute contract" meant to point a distinction between a conditional and an unconditional contract. The only condition which is to exist before the freighter is bound to pay demurrage is that the running days which are allowed should have commenced to run and should have run out; and if the ship is not in a condition to be used by the ship-owners by reason of the cargo not having been unloaded—that being the only condition, and not having been fulfilled—the freighter is bound to pay demurrage.".

Further down it continues (at p. 5) :—

"But if there were any reasons why, notwithstanding the specific terms of the contract, the defendant is not bound to pay, then it lies on him to prove it; it is for him to show that, although there has been a breach of the contract, he is excused from the consequences of such breach. That is a defence by way of confession and avoidance, and if he can show he is excused he is not liable at law, even though he has himself broken the contract.".

Lopes, L.J. in the same case said (at p. 7) :

"There is an essential difference between cases where a specific time is allowed for loading and unloading, and cases where the lay-days are not defined. In the former cases the time is limited without reference to subsequent events; in the latter, the question whether the merchant has been duly diligent must be determined by reference to the conditions under which he has actually worked. This is then, as I have said, an absolute contract on the part of the merchant to have the cargo unloaded within a specified time. In such a case the merchant takes the risk. The contract is, to use the words of Lord Justice Brett in *Proteus* v. *Watney*, 'that if the ship is not able

to discharge the whole of her cargo within the given number of days after she is at the usual place of discharge, he will pay for the delay, however the delay may be caused, unless it is by default of the ship-owner."

The learned counsel of the appellant argued that whether the trimming operations on board the ship were carried out properly or not was a matter peculiarly within the knowledge of the respondents and they had to adduce evidence to prove that they had acted reasonably in performing their part. The authorities in this direction (summarized in pp. 41—42 in Phipson on Evidence, 9th Edition) do not go beyond the following :—

> "These cases, however, have been considered to rest partly upon the construction of the Acts; and in the absence of statutory provision, the better opinion now seems to be that, in general, some prima facie evidence must be given by the complainant in order to cast the burden on his adversary.".
>
> "In considering the amount of evidence necessary to shift the burden of proof, the Court has regard to the opportunities of knowledge, with respect to the fact to be proved, which may be possessed by the parties respectively.".

We do not think therefore that the District Court misdirected itself as to the onus of proof or their findings of facts were not supported by sufficient evidence.

As to the Law applicable to the facts as found, the trial Court went at considerable length into the relevant authorities on the subject and we are thus relieved from the task of reviewing them. There is no doubt that stowing or trimming of the cargo on board the ship is part of the process of loading. Loading necessarily comprises a joint operation by the shipper and the ship-owners; (see *Argonaut Navigation Co. Ltd* v. *Ministry of Food*). (1) If both parties act reasonably in discharging their share in the work and yet there is delay beyond the anticipated date or laydays then unless the shipper is covered by any exception provided in the charter party he is liable to pay demurrage and this is not because he is negligent in performing his part but because the risk in the

(1) (1949) 1 All E.R. 160, per Bucknill, L.J. at p. 764.

circumstances and under the contract falls on him. Lord Finlay quoted Lord Hunter in *William Alexander and Sons* v. *Aktieselskabet Dampskibet Hansa* (1) as follows :—

> "It is well settled that where a merchant has undertaken to discharge a ship within a fixed number of days he is liable in demurrage for any delay of the ship beyond that period unless such delay is attributable to the fault of the ship-owner or those for whom he is responsible. The risk of delay from causes for which neither of the contracting parties is responsible is with the merchant.".

We are of the opinion therefore that the trial Court was right in their finding as to the facts and also in applying the law to the facts and that the appeal should be dismissed with costs.

Appeal dismissed with costs.

(1) (1920) A.C. 88, p. 93.