1987 February 14

[A. LOIZOU, J.]

LEFKARITIS BROS. MARINE LIMITED
OWNERS OF THE VESSEL «PETROLINA IV»,

Plaintiffs,

v.

DEMETRAKIS HJICONSTANTINOU, LARNACA CARRYING ON BUSINESS UNDER THE NAME TANYA SHIPPING OFFICE,

Defendants.

(Admiralty Action No.59/80).

Evidence—Original evidence, definition of—Hearsay evidence, definition of—Statements by persons who are not witnesses—They are either original evidence or hearsay—The test is the purpose of tendering such statements

Evidence—Practice—Admitting documents subject to their contents being rendered admissible subsequently and not left as mere hearsay—Course pursued in order to avoid unnecessary delay—Permissible—But at the end of day the Court can rely only on admissible evidence.

Admiralty—Voyage charter—Definition of—Master remains the servant of the shipowners—Instructions by the latter to the Master that he should follow the instructions of the charterer—Absence of agreement in that respect entered into by the charterer—Master remained the servant of the shipowners.

The plaintiffs agreed to charter their vessel to the defendant for a signle trip from Limassol to Sour, Lebanon to carry general cargo in consideration of a lump sum, prepaid on signing the bill of lading. Pursuant to the agreement the vessel loaded general cargo and on or about 2.4.79 proceeded to the port of Sour. On or about the 17.11.79, when the vessel was at the port of Beirut, Lebanon, she was arrested by the Authorities on the ground, as alleged by the plaintiffs, that at her arrival at the port of Sour as aforesaid, her cargo had been discharged in an unlawful manner. The vessel remained so arrested until 1.12.79.

As a result the plaintiffs brought this action claiming damages* against the defendants, alleging that the Master, although appointed by the plaintiffs, was at the relevant time under the orders and/or instructions of the defendant, who has a duty to indemnify the plaintiffs, for any loss or damage that they

*The particulars of damages appear at p.47 post.

have sufferred in consequence of the Master's compliance with such orders and/or instructions

In the course of the hearing the plaintiffs sought to produce various receipts but the defendant objected to such production The Court ruled that the receipts in question could be produced subject to the fact that the persons, who obtained them, would testify and identify them in due course The said receipts related to items a,b and c of the particulars of damages As regards item (d), no receipts or other evidence was adduced Furthermore the plaintiffs adduced evidence that the Master was instructed by one of their Directors to follow the instructions of the charterers

Held, *dismissing the action* (1) The law of evidence distinquishes between original and hearsay evidence The first indicates the evidence of a witness who deposes to facts of his own knowledge, whereas the second indicates the evidence of a witness, whose information is derived from other persons and he himself has no personal knowledge of the facts to which he deposes Hearsay evidence is not as a general rule admissible Moreover, statements by persons who are not witnesses are either original evidence or hearsay The test is the purpose of tendering such a statement If it is to prove that a statement has been made irrespective of whether its contents are true or false, then the evidence is original, whereas if it is to prove the truth of the fact asserted in the statement, the evidence is hearsay

(2) In this case the various documents were admitted subject to their contents being rendered admissible evidence and not left as hearsay evidence This course is not inconsistent with permissible practice and was pursued in order to avoid unnecessary delay However, at the end of the day the Court can only rely on admissible evidence It follows that as the plaintiffs failed to call the authors of the said documents, they should now be rejected

(3) As there is no admissible evidence as to why and on account of whose fault the arrest of the vessel was effected, the action must be dismissed

(4) In any event the terms of the agreement between the parties bring it within the definition of a voyage charter, which is «a contract to carry specified goods on a defined voyage or voyages, the remuneration of the shipowner being a freight calculated according to the quantity of cargo loaded or carried or sometimes a lump sum freight (Scrutton on Charter Parties 18th Edition, p 49) The Master, therefore, was the servant of the owners and the instructions that he should follow the directions of the charterer do not, in the absence of any agreement in that respect entered into by the charterer, make him the servant of the latter as regards compliance with the regulations and procedures at the port of discharge

Action dismissed with no order as to costs

Cases referred to:

Voniatis v. Koureas and Another (1979) 1 C.L.R. 492;

Ellias v. Yianni (1958) 23 C.L.R. 22;

Georghiades v. Patsalides and Another, 24 C.L.R. 275;

The «Eugenia» [1964] Q.B. 226.

Admiralty action.

Admiralty action for damages by plaintiffs against the defendants for breach of the charter party and/or agreement and/or contract entered into on or about 30.3.1979.

St. Karydes, for the plaintiffs.

G. Nicolaides, for the defendants.

Cur. adv. vult.

A. LOIZOU J. gave the following judgment. The plaintiffs' claim against the defendant is for:-

«(a) Damages for the loss suffered by them in consequence of the defendants and/or their servants and/or their Agents' breach of the Charterparty and/or Agreement and/or Contract and/or otherwise entered into on or about the 30th of March, 1979, and/or.

(b) Damages to and in respect of and/or in connection with the plaintiffs' ship «PETROLINA IV» and any loss and/or expenditure sustained to the plaintiffs by reason of the defendants' and/or their servants and/or their Agents' breach of contract, Agreement or duty and/or through negligence whereunder the Plaintiffs sustained damages, loss and/or expenditure.

(c) Legal interest and costs.»

The plaintiffs are a company with limited liability registered in Cyprus. At all material times to this action they were the owners of the vessel «PETROLINA IV» registered under Cyprus Flag, and the defendant was carrying, inter alia, the business of charterer and/or forwarder under the business name TANYA SHIPPING OFFICE.

On the 30.3.1979, an agreement entitled «Booking Note» was entered into between the plaintiffs and defendant, exhibit 1. The

plaintiffs agreed to charter the said vessel to the defendant for a single trip from Limassol to Sour Lebanon upon the terms set out in the said Agreement, which provided, inter alia, that other conditions would be «as per the attached addendum and GENCON C/P (unless otherwise specified in the booking note).» Specimen of the GENCON C/P agreement has been produced as exhibit 3.

Two of the terms of the aforesaid Addendum were as follows:-

«2. At Sour (port of discharge) the maximum cost will be U.S.$300 including Port Dues, Pilotage, Agency Fees etc. Anything over and above U.S.$300 will be for Charterer's Account...

3. The vessel immediately after loading will proceed to Sour, Lebanon, where she will discharge her cargo in a lawful manner and procedure. Such procedure is the charterers' responsibility.»

Term 14 of exhibit 3 reads:-

«In every case the owner shall appoint his own broker or agent both at the port of loading and the port of discharge.»

This condition, however, was varied by the agreement of the parties who, under the aforementioned term 2 of the addendum, the charterers had agreed to engage an agent of the ship in Sour and be reimbursed up to a maximum cost of US$300; anything over that being for the Charterers' Account.

Pursuant to the aforesaid Agreement the vessel proceeded at Limassol Port on or about 31.3.1979 and on the orders of the defendant loaded general cargo and on or about 2.4.1979 the vessel proceeded to the Port of Sour in Lebanon.

It is the contention of the plaintiffs that «when the vessel arrived at the Port of discharge the defendant in breach of their aforesaid undertaking and/or otherwise failed in their duty to take the proper and/or necessary steps and/or to make the necessary arrangements with the Lebanese Authorities for the discharge and/or unloading of the cargo in a lawful manner and procedure.» (See paragraph 6 of the Petition.)

On or about the 13.11.1979 the vessel arrived at the Port of Beirut and whilst she was ready to sail from the said Port on or about 17.11.1979, she was arrested by the Lebanese Port Authorities on the ground, as alleged by the plaintiffs, that at her arrival at the port of Sour on or about 2.4.1979, the cargo which then was on board had been discharged in an unlawful manner and/ or procedure. The vessel remained so arrested until the 1st day of December, 1979.

By reason of the matters aforesaid the plaintiffs claim to have suffered loss and damage amounting to the sum of US$25,715.11 as follows:

a. Amount paid by the plaintiffs to the Lebanese Authorities for taxes and penalty as a result of the unlawful discharge as above	U.S.$ 7,583.65
b. Amount paid by the plaintiffs for Legal fees and expenses	U.S.$ 9,551.60
c. Extra War Risk Insurance for 14 days from 17.11.79 to 1.12.79	U.S.$ 1,500.00
d. Demurrage for 14 days 01 hour and 55 minutes from 17.11.79, 10.00 hours, to 1.12.79 11.55 hours at U.S.$500 per day	U.S.$ 7,079.86
Total	U.S.$ 25,715.11

It was further and/or in the alternative alleged on behalf of the plaintiffs that the Master (although appointed by the plaintiffs) «was under the instructions and/or orders and/or directions of the defendant and/or his servants and/or agents as regards the lawful discharge and/or unloading of her cargo and the defendant was under the duty and/or responsibility to indemnify the plaintiffs for any loss or damage that they might suffer consequent to the Master's complying with such orders and/or instructions.»

In proof of their claim the plaintiffs called three witnesses and produced a number of documents, the contents of which and their legal significance in the light of the Rules of Evidence, I shall be dealing with in due course.

Marios Lefkaritis, one of the Directors of the plaintiff company

produced the booking note, to which already reference has been made (exhibit 1), a bundle of receipts obtained for the payments of the amounts paid under paragraphs (a) - (c) hereinabove set out (exhibit c). Their production was objected to on behalf of the defendants and I ruled on that objection that the receipts in question could be produced subject to the fact that the persons that obtained them would testify and identify them in due course. As regards item (d), no receipts or other evidence was adduced. The witness also produced a specimen of the GENCON C/P as exhibit 3. He further stated that he gave instructions to the Master of the ship that he should follow the directions of the charterers. He did so, as the ship would sail for Lebanon and discharge its cargo at Sour, and in accordance with the charter party the Master had to follow the instructions of the charterer. He gave, nowever, no other instructions to the Master, the charter being a voyage charter.

When sometime later the ship was arrested in Lebanon on another trip there, he instructed Mr. Savas Georghiades, an advocate, to proceed to Lebanon and act on their behalf and in the defence of their interests there. Upon hearing from Lebanon as to what was the situation there, he met the defendant and told him that he had been informed that the ship had been arrested at Beirut because the taxes payable to the authorities in Sour for the cargo discharged at the voyage covered by the booking note (exhibit 1) had not been paid. The defendant, according to this witness, was not in a position to tell him at that moment if these taxes had been paid or not, as he said that «that was a matter for the consignees of the cargo.»

Another relevant piece of evidence as to which this witness testified was that the agent of the ship in Limassol was appointed by the defendant in his capacity as charterer and that as regards the agent in Lebanon they agreed to deduct $300 from the freight so that they would cover the costs of the shipping agency at Sour in accordance with term 2 of the Addendum to exhibit 1.

Asked in cross-examination about the Master, he said that he had no reason to doubt his integrity until that moment and that he did not have in mind that he would be instructed to commit theft or other criminal act, in fact, he said that he did not know if he committed a criminal offence. He did not know if the amounts paid were taxes and penalties, all that he knew was that their

advocate asked them to pay this amount for the release of the ship. He then added that the Master and the crew were being paid by them at the time of the voyage.

The next witness was Mr. Savvas Georghiades, an advocate who went to Beirut on the instructions of the plaintiffs, engaged a local advocate, Mr. Petro Shannan, he inquired about the reasons of the arrest of the ship, the claims against her, so that arrangements would be made for her release. He also went to Beirut where he visited the Port Authorities and the Authorities also at the port of detention. He sent a telex to the defendants dated 20th November, 1979, (exhibit 4), which is marked on top «without prejudice», in which counsel Georghiades gives a full version of everything that came to his knowledge and upon which they base their present claim, holding the defendant responsible for the loss suffered by them and asking him to urgently «confirm and in any way the latest by 11 o'clock tomorrow, 21.11.79.»

The defendant in answer to this sent a telex dated 21st November, 1979 in which he says «we deny liability, all documents duly made, destination Sour port as agreed. If Captain of ship as your clients informed me delivered cargo unlawfully not our responsibility.»

The last witness for the plaintiffs was Mr. Petro Shannan, a practising advocate in Beirut, who testified that on request from Mr. Georghiades he studied the case and proceeded to obtain the release of the vessel which had been seized by the Customs Authority and that ultimately he reached a compromise with them and the vessel was released upon payment of penalty and customs fees. He produced a bundle of documents (exhibit 2) which consists of the following: the first is his account; the second is a certificate issued by the Customs Authorities that there was a case and the case was compromised and that he paid a penalty and taxes and which is a translation of the third document which is in Arabic. The fourth one is a photo copy of the official receipt for paying the penalty of 10,000 Lebanese pounds, and the fifth one is a receipt for the customs taxes paid by him. He then said that upon the payment of the amount in question the ship was released.

I shall turn now to the evidence of the defendant himself. As regards the agent at Sour, he said that it was intimated by him

because the one that the plaintiffs had was charging too much and he volunteered to introduce them to a cheaper one. He then said that the ship had to bring back the clearance documents to the effect that goods had been delivered and cleared through the Customs properly and that ultimately the bill of lading comes back also endorsed by the consignees to the effect that they received the goods. These documents come back to the shipowners. This, in effect, is the totality of the evidence before me.

Under the law of evidence, a distinction is made between original and hearsay evidence. The former is used to indicate the evidence of a witness who deposes to facts of his own knowledge whereas if his information is derived from other persons and he himself has no personal knowledge of the facts to which he deposes, then his evidence is said to be hearsay, which is not, as a general rule, admissible. I shall not deal with the exceptions to the hearsay rule, as we are not concerned with them in this case. Moreover, statements by persons who are not witnesses may be either original evidence or hearsay. The former covers the cases where the point in issue is whether they were made irrespective of whether their contents were true or false. Such statements are not to be taken as proof of the truth of the facts asserted therein. In the latter case there are included the statements when they are offered to prove the truth of the matter asserted. In other words, the test is the purpose for which the evidence is tendered.

In the present case, the various documents were admitted subject to their authors being called as witnesses or to put it more generally, subject to their contents being rendered admissible evidence subsequently and not left as mere hearsay. It was a course not inconsistent with permissible practice and pursued in order to avoid unnecessary delay. (See *Voniatis v. Koureas and Another,* (1979) 1 C.L.R. 492 at p.498). In any event, at the end of the day and as a result of the failure of the plaintiffs to call their authors, this evidence which was objected to in the course of their production as inadmissible as to their contents has to be rejected now that I am considering my Judgment, as a Court of Law must arrive at its Judgment upon legal evidence only. (See *Ellinas v. Yianni,* (1958) 23 C.L.R. p.22, and *Tilemahos Georghiades v. Odysseas Patsalides and Another,* 24 C.L.R. 275 at p.280).

In the light of these authorities and discarding all inadmissible

evidence, I have come to the conclusion that although the evidence adduced establishes that the plaintiffs' ship had been arrested on the 17th November, 1979, there is no admissible evidence to prove as to why and on account of whose fault that arrest was effected and, consequently, the plaintiffs' claim must be dismissed as they have failed to prove by admissible evidence their claim against the defendants.

Before concluding, however, I would like to deal with a question which arose regarding the legal relationship of the Master of the vessel in question towards the charterer and the shipowners. The charter in question was not one by demise. The shipowners agreed with the charterer to render services by his master and crew and to carry the goods which had to be on board this ship by or on behalf of the charterer.

As pointed out in Scrutton on Charter Parties, 18th edn., Article 24, p.45:

> «In this case, notwithstanding the temporary right of the charterer to have his goods loaded and conveyed in the vessel, the ownership and also the possession of the ship remain in the original owner through the master and crew, who continue to be his servants. Although the master, by agreement between the owner and charterer, may acquire authority to sign bills of lading on behalf of the latter, he nevertheless remains in all other respects the servant of the owner. *(Sandeman v. Scurr,* [1866] L.R. 2Q.B. 86 at p.96; *Braumwoll v. Furness* [1893] A.C. 8; *Manchester Trust v. Furness, Withy & Co.* [1895] 2 Q.B. 539 (C.A.); and see Art.39.)»

In our case, what was agreed upon was a voyage charter as it was a contract to carry «lawfully general cargo up to 700 metric tons» on a defined voyage, the remuneration of the ship-owners being a «lump sum - US$6,000, prepaid on signing bill of lading.» (See exhibit 1). This agreement brings it within the definition of a voyage charter given in Scrutton on Charter Parties supra, at p.49, to the effect that «A voyage charter... is a contract to carry specified goods on a defined voyage or voyages, the remuneration of the ship-owner being a freight calculated according to the quantity of cargo loaded or carried or sometimes a lump sum freight.» *(The Eugenia,* [1964] Q.B. 226 (C.A.)).

The Master, therefore, was, for all intents and purposes, the servant of the owner and the fact that the plaintiff claims to have instructed their Master that he should follow the directions of the charterer does not, in the absence of any agreement in that respect entered into by the charterer, make him the servant of the latter as regards the question of compliance with the regulations and procedures at the port of discharge.

For all the above reasons, this action is dismissed, but in the circumstances, there will be no order as to costs.

Action dismissed with no order as to costs.