ND 1961 325 NH (VESTKYST I)

The Norwegian Supreme Court, 16 December 1961

Mosjøen Aluminium A/S
(Attorney Jan Frøystein Halvorsen - under examination)

vs

Johan Aronsen
(Supreme Court Attorney Alex. Rein)

The shipowners of the "Vestkyst I", who were required to pay compensation to the cargo receivers on the basis of the Hague Rules for a shortage in a cargo of aluminium bars, claim recourse against the charterers pursuant to Clause 2 of the Gencon charterparty.

Oslo City Court, whose judgement is referred to from p. 114 above, held (one judge dissenting) that the agreement contained in the charterparty meant that the shipowner should be free of liability, and that this had to be maintained, even if the charterers transfer the bill of lading with the effect that the shipowner is primarily liable to pay compensation for the shortage to the receivers.

The Supreme Court agrees with the dissenting opinion in the City Court and does not find that Clause 9 of the Gencon charterparty together with Clause 2 reserve a right of recourse against the charterers for increased liability of the shipowner which may arise as a result of negotiation of the bill of lading in accordance with the mandatory provisions of the Act on Bills of Lading.
Judgement (on p. 329).

I have come to the same conclusion as the dissenting City Court judge and agree with the essentials of his reasoning.

According to the facts of the case as agreed by the parties, a shortage arose in the cargo during transport on board the vessel. In accordance with the Hague Rules and Section 118 of the Norwegian Maritime Code, the shipowner would have been liable for such loss. However, the parties agree that pursuant to Clause 2 of the Gencon charterparty the shipowner is to be indemnified in respect of losses of the present nature. The parties are similarly agreed that when the shipowner has been found liable and required to pay compensation for the loss, it is as a result of the fact that a bill of lading has been issued and transferred to the purchaser of the cargo, with the result that the shipowner has incurred liability under the bill of lading pursuant to the mandatory provisions of the Act on Bills of Lading. The parties are in full agreement as to the amount of the compensation and the facts of the case.

The question in this case is exclusively whether the shipowner may seek recourse from the charterer for the compensation he has paid to the cargo receiver. The respondent is of the opinion that both the provisions of the Gencon charterparty governing liability as well as the provisions of Section 95 sub-section 3 of the Norwegian Maritime Code provide grounds for this recourse claim.

There is no doubt that Clause 2 of the Gencon charterparty, which extensively limits the liability of the shipowner for loss of or damage to cargo, does not contain any specific provision to the effect that the shipowner shall have a right of recourse against the charterer if he is required by a third party, a cargo receiver, to pay compensation for loss or damage of a type for which the

owner is exempt from liability.

Nor can I see that Clause 9 of the Gencon charterparty, held together with Clause 2, reserves a right for the shipowner to claim indemnification from the charterer in the event the issuance of a bill of lading has led to increased liability for the shipowner compared to what follows from the liability provisions of the charterparty. It is only in the event that the bill of lading contains a lower rate than that of the charterparty that Clause 9 contains a clear reservation, as payment of the difference in the rates may in such instance be claimed on signing the bill of lading.

Although I therefore cannot see that the charterparty contains any reservation for recourse in a case such as this, I nevertheless find that it is admittedly natural that the shipowner can claim indemnification from the charterer when he has been required to pay compensation to the cargo receiver for a loss for which, according to the charterparty, he should not have been liable. If the shipowner cannot claim recourse, the limitation of liability will to a great extent have no effect. Since it is common practice to issue a bill of lading which is then sent to the cargo receiver, this situation will arise regularly.

Further support for the view that the charterparty must allow for recourse may be found in the fact that, pursuant to Clause 9 of the charterparty and Section 95 of the Norwegian Maritime Code, the ship's master is obliged to issue a bill of lading. The charterer has the option to transfer this obligation to third parties and thereby impose on the shipowner liability under the bill of lading pursuant to the mandatory provisions of the Act on Bills of Lading, thereby increasing the shipowner’s liability far in excess of the liability it has pursuant to the provisions of the charterparty.

When I nevertheless assume that the charterparty cannot be considered to allow for recourse, it is because the charterparty does not contain any clear reservation of a right of recourse. The limitation of liability in Clause 2 is very extensive and results in a severe limitation of the liability which the shipowner would otherwise have pursuant to the Hague Rules and the Norwegian Maritime Code. It is natural to interpret such a limitation of liability strictly, and not interpret into its passive exemption from liability a positive right of recourse in the absence of definite support for this in the wording.

In this respect I also give weight to the fact that Gencon is an old form of charterparty used extensively the world over. It has been stated that it dates from 1915 but was revised following adoption of the Hague Rules. Situations of this type, where the shipowner incurs liability under the bill of lading which exceeds the liability provisions of the charterparty, must have occurred frequently. It would therefore be reasonable that the charterparty had to contain a clear reservation, if it had been the intention that it should allow the shipowner to claim recourse against the charterer.

A further reason to require a clear reservation of a right of recourse is that, as submitted by the appellant, legal theory points out that a right of recourse is not automatic, but rather must be specifically agreed.

Nor has it been shown that it is the practice in this country or any other to construe the Gencon charterparty to the effect that it provides the shipowner with a right of recourse against the charterer in cases such as the present case, despite the fact that such instances must arise regularly.

My interpretation of the reservation is therefore that even in cases where a Gencon charterparty has been signed, every shipowner must consider that bills of lading will be issued and negotiated which impose upon him a liability exceeding that set out in the charterparty. The shipowner is aware of this and his third party liability insurance cover also covers this liability. On the other

hand, the position of the charterer is that when, as in the present case, he has shipped the cargo and sent the bill of lading, he regards his involvement to be at an end. The liability the charterer would incur if obliged to indemnify the shipowner would not be covered by the cargo insurers, which would normally be the first to compensate the loss and thereafter claim reimbursement from the shipowner or its insurers. The charterer would not normally be insured against such course claim from the shipowner.

Nor does Section 95 sub-section 3 of the Norwegian Maritime Code provide a legal basis for a shipowner to claim recourse from the charterer in this case. The wording of that provision provides legal basis for a claim of indemnification by the shipowner if bills of lading are issued on terms which differ from those set out in the contract of affreightment, if this increases the liability of the shipowner. In this case, it is clear that it is not the terms of the bill of lading that have resulted in the increased liability, but rather the mandatory liability provisions of the Act on Bills of Lading.

In and of itself it may seem reasonable to liken the situation that the issuance and negotiation of the bill of lading increases the liability of the shipowner due to the liability provisions of the Act on Bills of Lading, with the situation dealt with directly in Section 95 sub-section 3, i.e. that the terms of the bill of lading deviate from the terms of the charterparty. The situations are however not entirely analogous. The liability for bills of lading pursuant to the Act on Bills of Lading is well known. As stated above, I assume that the shipowner normally allows for the issuance and transfer of bills of lading. The issue of terms in the bill of lading that deviate from the charterparty is however a different matter. They may be unknown to the shipowner. In such a case itis natural to ensure indemnification of the shipowner.

The determining factor for the conclusion that Section 95 sub-section 3 cannot be applied in cases such as the present case must be the fact that the report of the Maritime Commission of 1936 at page 41, contains an express statement that the provision is not intended for cases such as this, where the bill of lading is subject to the Act on Bills of Lading. This is also strongly emphasised in Jantzen "Godsbefordring til sjøs", second edition, page 152, where he states:

"The Act implementing the Hague Rules has the effect that the shipowner can to a large degree incur greater liability to the acquirer of the bill of lading than what follows from the charterparty; however, although this arises by way of an arbitrary and unilateral act of the charterer, namely the transfer of the bill of lading, there is no question of r e c o u r s e in this situation unless this is specifically agreed…"

Nor has it been shown that the legislation has in practice been understood to provide a right of recourse in such cases despite the fact that, as has been said, it is normal practice for bills of lading to be issued, with the resultant liability which exceeds the liability provisions of the charterparty.

I find therefore for the charterer.

Neither party claims costs since the case has been brought by the insurance companies involved for the purpose of resolving a question of principle.

I vote for:

Judgment

In favour of Mosjøen Aluminium A/S.

Judge *Hiorthøy*: I concur in all essentials and as regards the conclusion with the first-voting judge.

Judge *Thrap*: Likewise.

Judge *Eckhoff*: Likewise.

Judge *Berger*: Likewise.

On a vote, the Supreme Court found in favour of Mosjøen Aluminium A/S.