LLOYD'S LIST
LAW REPORTS

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VOL. 57. No. 9] THURSDAY, APRIL 22, 1937. [BY SUBSCRIPTION

COURT OF APPEAL.

Tuesday, Mar. 23, 1937.

PETROFINA, S.A., OF BRUSSELS v. COMPAGNIA ITALIANA TRASPORTO OLII MINERALI, OF GENOA.

Before Lord WRIGHT (Master of the Rolls), Lord Justice ROMER and Lord Justice GREENE.

Charter-party — Unseaworthiness — Damage to oil cargo—Discoloration —Benzine shipped water white; part discharged superfine white—Liability of shipowners—" (1) That the steamer being tight staunch and strong and every way fitted for the voyage, and to be maintained in such condition during the voyage, perils of the sea excepted. . . . (16) The captain is bound to keep the tanks, pipes and pumps of the steamer always clean, but at the expense of the charterers if they load in the tanks oils of different nature to those previously shipped. The steamer is not to be responsible for any consequences arising through charterers shipping different kinds of oil. The steamer is not to be accountable for leakage. (27) Steamer to clean for the cargo in question to the satisfaction of charterers' inspector "—No negligence on part of shipowners in making vessel fit to carry cargo—All reasonable steps taken by master to make the tanks clean and fit for the cargo—Inspection by charterers' representatives under Clause 27—Acceptance of vessel as fit to load — Owners' allegation that damage was caused by sea perils negatived by arbitrator—Award that shipowners were protected by charter-party terms from liability for discoloration — Case stated — Effect of Clause 27—Whether lessening shipowners' responsibility.

———Held, by C.A., affirming SINGLETON, J., *that the express warranty of seaworthiness contained in Clauses 1 and 16 was not affected by Clause 27, which was intended to be an addition to and not in substitution for the other clauses (If it is sought to effect a limitation of the overriding obligation to provide a seaworthy ship by other express terms, that result can only be achieved if perfectly clear, effective and precise words are used expressly stating that limitation); and that, the shipowners having failed to prove some excepted peril relieving them from liability, they were responsible to the charterers for the damage—Alternative award in favour of charterers upheld.*

This was an appeal by the shipowners from a judgment of Mr. Justice Singleton (56 Ll.L.Rep. 141) upon an award in the form of a special case stated under Sect. 9 (1) (b) of the Arbitration Act, 1934, by Sir Norman Alexander Leslie as umpire in an arbitration between the charterers, Petrofina, S.A., of Brussels, and the owners of the Italian tank steamer *Gianna M.*, the Compagnia Italiana Trasporto Olii Minerali (C.I.T.O.M.), of Genoa, wherein the question was whether the owners were protected by the terms of the charter-party from liability for any discoloration of benzine carried from Constantza to Ango-Ango, West Africa.

The arbitrator, subject to the opinion of the Court, awarded that the shipowners

were protected by the charter-party terms. His Lordship, however, held that the umpire was wrong in law and upheld an alternative award in favour of the charterers; and the shipowners now appealed.

According to the special case, by a charter-party dated Genoa, Aug. 30, 1933, the Compagnia Italiana Trasporto Olii Minerali (hereinafter called the owners) chartered the tank steamship *Gianna M.* to Petrofina, S.A. (hereinafter called the charterers) for the carriage of a part cargo of about 3000 tons of fuel oil and about 3500 tons of refined petroleum and/or spirit from Constantza to Ango-Ango and Lobito. The charter-party provided (*inter alia*) as follows:—

(1) That the steamer being tight staunch and strong and every way fitted for the voyage, and to be maintained in such condition during the voyage, perils of the sea excepted, shall, with all convenient dispatch, sail and proceed to Constantza or so near unto (*sic*) as she may safely get (always afloat) and there load from the factors of the said charterers a part cargo of about 3000 tons of fuel oil and about 3500 tons of refined petroleum and/or spirit in bulk, not exceeding what she can reasonably stow and carry over and above her tackle apparel provisions and furniture (sufficient space to be left in the expansion tanks to provide for the expansion of the cargo) and being so loaded shall therewith proceed (as ordered on signing bills of lading) direct to Ango-Ango and Lobito or so near thereunto as she may safely get (always afloat) and deliver the same on being paid freight at and after the rate of a lump sum of £4500 (Four thousand five hundred pounds sterling).

(9) The Act of God, perils of the sea . . . and other accidents of navigation excepted, even when occasioned by negligence, default or error in judgment of the pilots, master, mariners or other servants of the shipowners. Ship not answerable for losses through . . . any latent defect in the . . . hull not resulting from want of due diligence by the owners of the ship, or any of them, or by the ship's husband or manager . . .

(13) This contract shall be governed by the laws of the flag of the steamer carrying the goods except in cases of average or general average, when same to be settled according to York/Antwerp Rules, 1924.

(16) The captain is bound to keep the tanks, pipes and pumps of the steamer always clean, but at the expense of the charterers if they load in the tanks oils of different nature to those previously shipped. The steamer is not to be responsible for any consequences arising through charterers shipping different kinds of oil. The steamer is not to be accountable for leakage.

(23) Owners guarantee vessel's last cargo consisted of fuel oil and/or gas oil.

(27) Steamer to clean for the cargo in question to the satisfaction of charterers' inspector.

Subsequently, in September, 1933, it was arranged that the owners should place at the disposal of the charterers one of their vessels, if possible the *Gianna M.*, for the Congo voyages which the charterers might have to carry out between that date and the end of 1936, the voyages to be carried out under the conditions of the charter-party. This arrangement was confirmed by a letter dated Sept. 12, 1933, from Mr. Wolters, representing the charterers, to Mr. Quaglia, representing the owners.

In accordance with the above arrangements, the owners placed at the disposal of the charterers the *Gianna M.* to load a cargo at Constantza between Oct. 10 and 31, 1934, for Ango-Ango and Lobito. The charterers agreed on this occasion to load 5000 tons of refined petroleum and/or spirit and 1000 tons of gas oil, paying the owners an extra £500 for cleaning, making the lump sum freight for this voyage £5000 instead of £4500, the charterers having the option to ship a complete cargo. This arrangement was confirmed by letters dated Aug. 24 and 27, 1934, from the charterers to the Soc. Marittima Noleggi & Commissioni, of Genoa, representing the owners, and a letter dated Aug. 24, 1934, from the Soc. Marittima Noleggi & Commissioni to the charterers.

The *Gianna M.* arrived at Constantza from Teneriffe on Oct. 30, 1934, to load. The vessel left Teneriffe in ballast and the master took the opportunity during the voyage to Constantza of cleaning the tanks by washing by hand, with gas oil and with the special pump, evaporating and then washing with hot water, making the main tanks 4, 5, 6, 7 and 8 and all the summer tanks fit to receive white cargo and the three forward tanks ready to receive gas oil.

On arrival at Constantza the master requested the Concordia Company to inspect the tanks on behalf of the charterers. This was done on Oct. 30 by

Mr. Jonescu, manager of the Concordia Company, who wrote to the master on Nov. 1, 1934, as follows:—

Nettoyage tanks.

Par le présente nous avons l'honneur de vous confirmer qu'à la suite de l'inspection que nous avons fait le 30 Octobre, aux tanks de votre bâteau, nous avons attiré votre attention sur le fait que:

(1) le tank No. 3 doit être complètement nettoyé et lavé:

(2) qu'il faut completer le lavage des autres tanks pour les mettre en parfait état de chargement.

A cette occasion nous signalons que les staries commenceront pour nous au moment que les tanks sont parfaitement propres et prêts à charger.

The master took steps to have this done and the cleaning of the tanks occupied until Nov. 5, 1934, when the vessel was accepted by shippers as fit to load. The vessel has eight main tanks counting from forward and ten summer tanks, five starboard and five port.

The vessel commenced loading at 1 a.m. on Nov. 6 and finished at 4 a.m. on Nov. 8, 1934. The cargo loaded consisted of 4520.197 kilograms of medium benzine in the main tanks 3, 4, 5, 6 and 7 and in all the summer tanks; 828.712 kilograms of kerosene in main tank No. 8, and 1531.783 kilograms of gas oil in main tanks 1 and 2. The master signed bills of lading for the above quantities with the addition of the words "weight, quantity and quality unknown to me." Samples of the medium benzine were taken at the loading port.

The vessel left Constantza on Nov. 8 and arrived at Ango-Ango on Dec. 7, 1934, where the Ango-Ango portion of the cargo was discharged. Samples were duly taken of the cargo and sealed on the vessel's arrival, and the receivers reported to the charterers that the greater part of the benzine was yellow and much discoloured. The charterers instructed the receivers to accept the benzine and have it treated ashore.

The charterers claimed from the owners damages for the discoloration of the benzine which they alleged was due to the condition of the vessel's tanks. Evidence was given before the arbitrator that the recognised test of determining discoloration of benzine was the Lovibond test, according to which white spirit was divided into two classes, viz.: "water white" represented by the index figures 0 to 1 and "superfine white" represented by the index figures 1.1 to 2.0. Above 2.0 spirit is classified as "coloured." It was proved before the arbitrator that according to this test the two samples taken after shipment from the vessel's tanks gave the following results: 0.3 and 0.7, which is equivalent to water white by the above test. The samples taken on discharge at Ango-Ango gave the following results:—

From tank No. 3: 1.8—superfine white.
From tank No. 4: 1.7—superfine white.
From tank No. 5: 1.5—superfine white.
From tank No. 6: 1.0—water white.
From tank No. 7: .8—water white.

It was alleged on behalf of the owners that the vessel met with bad weather on the voyage, particularly on Nov. 13 and 14, 1934, when the wind amounted to a full gale at 4 a.m. on Nov. 13, lasting until 8 a.m. on Nov. 14, when the sea began gradually to diminish and the vessel was able to resume normal navigation. According to the entry in the log the vessel was swept by enormous waves which passed right over her, the vessel pitching and rolling heavily and irregularly and having to proceed at reduced speed with bows to the sea, and in his entry in the log book on Nov. 14 the master expressed a fear that the various qualities of cargo might have become damaged or mixed together, filtering from tank to tank or from tank to summer tank through some loosening or breakage occurring in the piping which connected all the tanks. Information obtained from the Air Ministry did not bear out this allegation of bad weather in the position in which the *Gianna M.* was on Nov. 13, 1934.

The charterers contended that the discoloration of the benzine was due to the dirty condition of the tanks when the benzine was shipped and that they were accordingly entitled to recover damages from the owners.

The owners contended that their liability under the charter-party was to clean the tanks to the satisfaction of the charterers, which they did, and that they were protected by the terms of the charter-party from liability for any such discoloration.

So far as they were questions of fact, the arbitrator found and so far as they were questions of law he held as follows:

(1) That the benzine on shipment was water white, the samples taken at the load-

ing port having an index, according to the Lovibond test, of 0.3 and 0.7.

(2) That the benzine carried in the main tanks 3, 4 and 5 when discharged at Ango-Ango was superfine white with an index, according to the Lovibond test, of 1.8, 1.7 and 1.5 respectively, and that the benzine discharged from main tanks 6 and 7 was water white with an index of 1.0 and 0.8 respectively. There was no claim in respect of the benzine carried in the summer tanks.

(3) That there was no negligence or want of due diligence on the part of the owners or their servants in making the vessel fit to carry the cargo that was loaded and that all reasonable steps were taken by the master to make the tanks clean and fit for the cargo.

(4) That the charterers' representatives at Constantza after inspecting the *Gianna M.* were satisfied with the condition of the tanks and accepted the vessel as fit to load the cargo, and that the vessel was clean for the cargo in question to the satisfaction of the charterers.

(5) That the weather conditions during the voyage were normal and such as might reasonably have been expected at the time the voyage was performed and there was no evidence of any slackened rivets or loosening or breakage in the piping connecting the tanks as a result of the weather encountered during the voyage.

(6) That Italian law so far as was material to the dispute in question was the same as English law.

Subject to the opinion of the Court, the arbitrator awarded that the owners were protected by the terms of the charter-party from liability for any discoloration of the benzine during the voyage.

The question for the opinion of the Court was whether the owners were or were not protected by the terms of the charter-party from liability for any discoloration of the benzine during the voyage.

Mr. P. A. Devlin (instructed by Messrs. Thos. Cooper & Co.) appeared for the shipowners; Mr. G. St. Clair Pilcher, K.C., and Mr. C. A. Roberts (instructed by Messrs. William A. Crump & Son) represented the charterers.

Mr. DEVLIN addressed the Court.

Counsel for the charterers were not called upon.

JUDGMENT.

Lord WRIGHT, M.R.: Mr. Devlin has very ably said all that can be said in support of the appeal in this case, but I think that the appeal fails and that the judgment of Mr. Justice Singleton was right. Furthermore, I agree with his reasons.

The facts as stated by the arbitrator in the special case may be quite shortly stated. The vessel in question, the *Gianna M.*, was chartered by the owners, who are the appellants here, to the Petrofina, S.A., the charterers, who are the respondents here, for the purpose of carrying a part cargo of fuel oil and petroleum. She loaded her cargo at Constantza for two ports in West Africa. The cargo when loaded was, so far as the petroleum was concerned, white. It was benzine and it was all certified to be what is called water white benzine, which is a superior quality. On discharge at the port of destination it was found that a large portion of the benzine, that is, the portion in certain tanks, instead of being water white benzine turned out to be either superfine white, which is a form of discoloured benzine, or was in a still worse condition which is classified as coloured benzine, and the claim by the charterers was for damages for not delivering the cargo in the same condition in which it was shipped.

There are certain terms in the charter-party which have to be considered, and I am going to decide this case simply on the terms of the charter-party. It is not necessary to consider here whether the steamer was a common carrier, or, if not a common carrier, was under the same liabilities as a common carrier, because we have a specifically expressed contract and there is no need to look beyond its terms. There are very few clauses which are material. In Clause 1 you have this: That the said steamship, being tight, staunch and strong, and in every way fitted for the voyage, and to be maintained in such condition during the voyage, perils of the sea excepted, shall, with all convenient dispatch, sail and proceed to Constantza and there load a cargo in bulk of fuel oil, and being so loaded shall proceed therewith to Ango-Ango and Lobito, and so forth. Then in Clause 9 they have elaborate exceptions, including the Act of God, perils of the sea, and so forth. In Clause 13 there is a provision that the contract must be covered by the law of the flag, that is, Italian law, but it is agreed that Italian law, for this purpose, is to be taken to be the same as English. In Clause 16 you have a provision that the captain is bound to keep the tanks, pipes and pumps of the steamer always clean, with a qualification in regard to different kinds of oil. No

question arises upon that latter point. Then you have in addition to the printed clause a number of typewritten clauses, one of which is Clause 27:

> Steamer to clean for the cargo in question to the satisfaction of charterers' inspector.

The arbitrator, in coming to his conclusion that the owners were entitled to succeed, has stated his findings and his conclusions as follows. I will only read those that are material.

> (1) That the benzine on shipment was water white, the samples taken at the loading port having an index, according to the Lovibond test, of 0.3 and 0.7.
> (2) That the benzine carried in the main tanks 3, 4 and 5 when discharged at Ango-Ango was superfine white with an index, according to the Lovibond test. of 1.8, 1.7 and 1.5 respectively

—and that the benzine discharged from certain other tanks was water white. Then:

> (3) That there was no negligence nor want of due diligence on the part of the owners or their servants in making the vessel fit to carry the cargo that was loaded and that all reasonable steps were taken by the master to make the tanks clean and fit for the said cargo.

Then:

> (4) That the charterers' representatives at Constantza after inspecting the *Gianna M.* were satisfied with the condition of the tanks and accepted the vessel as fit to load the said cargo, and that the vessel was clean for the cargo in question to the satisfaction of the charterers.

Then he finds that there were no weather conditions which would account for any of the trouble. Then he finds that Italian law, so far as is material to the dispute, is the same as English law.

On those findings it is not expressly stated that the ship was unfit to carry the cargo, that is to say, that the tanks were not properly cleaned before the cargo was shipped. That, if found, would *prima facie* constitute a breach of the express warranty. But though it is not expressly found, it is not contested that that must have been the case, because there is no other circumstance that can be thought of or has been suggested to account for the deterioration in the condition of this cargo. The case has been argued very properly by Mr. Devlin on that assumption. He admits, or it is clear, that Clause 1 is an express warranty of seaworthiness in the sense of fitness to carry the stipulated cargo. The words are: "Every way fitted for the voyage." Clause 16 confirms and extends the same warranty, or perhaps rather it applies the same obligation—which, under Clause 1, is made applicable to the initiation of the voyage—to the course of the voyage. It says: "The captain is bound to keep the tanks, pipes and pumps of the steamer always clean." It does not matter whether that overlaps Clause 1 and then comes on to deal with the later course of the voyage, or whether it is independent of Clause 1 and only deals with the later course of the voyage.

So far, upon this assumption of fact, there can be no question as to the liability of the shipowners. But Mr. Devlin has argued that when Clause 27 is considered it has the effect of excluding this fundamental obligation and substituting for it an obligation merely to clean—that means to clean the holds before loading the cargo in question—to the satisfaction of the charterers' inspector. His argument is that that is a clause which is inserted for the owners' benefit, in this sense, that it cuts down what would otherwise be their general obligation to have the holds fit to receive the cargo at the time when they are loading.

I find it impossible to accept that contention. We are dealing here with a contract of affreightment and it is necessary to bear in mind the well-established view that has been stated so often, that if it is sought to effect a reduction or a general limitation of the overriding obligation to provide a seaworthy ship—whether that is express or implied for this purpose does not matter—by other express terms of the charter-party or contract of affreightment, that result can only be achieved if perfectly clear, effective and precise words are used expressly stating that limitation. I think the language of Clause 27 here is not sufficient. To make it sufficient I think it would need to be amplified in something like this manner. It would have to run: "Steamer to clean for the cargo in question to the satisfaction of the charterers' inspector and if that is done that shall be treated as fulfilment of the obligations under Clauses 1 and 16." Clause 27 does

not say so. I think, on the contrary, it has a much more limited effect. It gives, as I think, an added right to the charterer. He is entitled before he loads the cargo to have an inspection and to have a certificate, or whatever the form of the evidence is, that his inspector is satisfied. But, without express words, the satisfaction of the inspector cannot be relied upon by the owners as a discharge and fulfilment of their obligations. From the point of view of the charterers this super-added right is something which it is worth their while to have. It gives them some sort of guarantee against their being involved in questions such as this, where unfortunately, notwithstanding the inspection, there has been a failure to provide tanks sufficiently clean and in proper condition.

If authority were needed for that conclusion, which I have arrived at simply on the construction of the contract without any authority, it is to be found in the well-known case, which is often referred to, of Sleigh & Others v. Tyser, [1900] 2 Q.B. 333. That was a case of a policy of marine insurance on cattle which contained a clause that the fittings of the ship were to be approved by a Lloyd's surveyor. The fittings were approved but it turned out during the voyage that they were insufficient. There were other clauses which are not here material, but the ship was held not to be seaworthy, and it was held that the warranty of seaworthiness which is inherent in a marine policy on goods to be carried on a ship, namely, that the ship is seaworthy, was not excluded. That was a case of implied warranty; but notwithstanding Mr. Devlin's argument he is in no worse and no better position here because the warranty is not an express contract. The arguments on one side or the other are very shortly stated on p. 334:

> Joseph Walton, Q.C., and J. A. Hamilton, for the plaintiffs. There was no implied warranty in the policy that the ship should be seaworthy in respect of the possession of sufficient appliances for ventilation. The implication of such a warranty is excluded by the provision that the fittings and condition of the cattle were to be approved by Lloyd's agent's surveyor. The term "fittings" includes ventilating appliances, and they were in fact duly approved by the surveyor. The express condition as to the approval of the surveyor was intended to limit the liability of the assured.

Then:

> Robson, Q.C., Scrutton and MacKinnon, for the defendants. The implied warranty of seaworthiness which *prima facie* every policy contains can only be excluded by express terms.

And they refer to the well-known passage from the judgment of Lord Penzance in Quebec Marine Insurance Company v. Commercial Bank of Canada, L.R. 3 P.C. 234, at p. 242:

> If, therefore, there is an intention to exclude that implied warranty it ought to be expressed in plain language.

Those were the respective contentions, and Mr. Justice Bigham agreed with those of the defendants, and held that the policy was avoided by the initial breach of warranty of seaworthiness. He said, at p. 337:

> I think this stipulation was inserted in the policy for the benefit of the underwriters, and was intended to be additional to and not in substitution for the important condition upon the basis of which all contracts of this description are *prima facie* made. It may be asked, What additional advantage does the stipulation give to the underwriter? I think the answer is that it probably enables him to reinsure with greater ease, and it affords him some assurance that he will not find himself involved in an action such as this.

Those latter words can be applied to the present case. Then Mr. Justice Bigham goes on:

> To exclude the implied warranty of seaworthiness the words used must be express, pertinent, and apposite.

Finally he concludes by saying:

> The stipulation is, in my opinion, merely super-added for the benefit of the underwriter, and therefore does not exclude the implied warranty.

Then he refers to the case of Mody v. Gregson, L.R. 4 Ex. 49, at p. 53, where there is a general statement of the rules regulating the relationship of implied and express terms.

I agree completely with that decision,

which is well known to everyone concerned in this class of case and which, so far as I know, has been variously approved of, even if it has not previously come before this Court, and I think *mutatis mutandis* every word of the judgment applies. I think on those grounds the judgment of Mr. Justice Singleton is right.

The other way in which the case was argued before Mr. Justice Singleton has not been pursued here, because Mr. Devlin has very fairly admitted that if he fails on this point which I have been discussing he fails altogether, and it does not concern him to show that he could have induced the Court to come to another conclusion on the other way of putting the case. I may say, however, that though I have not had the benefit of Mr. Devlin's argument on the point I do not, as at present advised, see any reason at all to differ from the way in which the case is put on this other point by Mr. Justice Singleton.

The point may be stated very shortly in this way. The shipowner contracts to load a cargo and to deliver the same on certain terms, that means to deliver the same cargo in the same condition as shipped, unless the shipowner can justify the defective condition by bringing himself within an exculpating clause. The onus of doing so is upon him, and he can only do it by explaining how the accident happened, and explaining it in such a way as enables him to escape liability under the terms of his contract. Nothing of the sort has been done here, and the same result, as at present advised, would have followed from this way of looking at the case.

I think, therefore, that the appeal fails and should be dismissed, with costs.

Lord Justice ROMER: It is inherent in construction to give effect where it is possible to every part of a written document, none the less because the document happens to be a charter-party. In the present case, therefore, we must give effect both to Clause 16 and to Clause 27 of this charter-party, if it be possible. In my opinion, it is possible. In Clause 16 the owner undertakes to keep the tanks, pipes and pumps of the steamer always clean. In construing Clause 27 you must do so with the knowledge of the fact that by Clause 16 that obligation has been undertaken in plain terms by the owner. That being so, it is plain that the true construction of Clause 27 is this, that the owner is saying: "I have by Clause 16 undertaken in plain terms the obligation of keeping the tanks clean. Not only will I keep the tanks clean, but I will keep them clean to the satisfaction of the charterers' inspector." The result of that is that the owner can only discharge his obligations in respect of cleaning under the charter-party by cleaning the tanks, keeping them clean, and doing so to the satisfaction of the charterers' inspector. If he keeps them clean, and does not obtain the approval of the charterers' inspector, he has not fulfilled his contract; nor has he fulfilled his contract if he fails to keep them clean but the charterers' inspector has expressed his approval of the state of the tanks.

For those reasons I think the appeal fails and must be dismissed.

Lord Justice GREENE: I agree and have nothing to add.

Lord WRIGHT, M.R.: I ought perhaps to say, in deference to the argument of Mr. Devlin, that the construction of the charter-party is a question of law for the Court, and as such was submitted to this Court by the arbitrator.

Leave to appeal to the House of Lords was refused.