1967

*Feb. 1, 2
June 26

BROWN & ROOT LIMITED (*Defendant*) APPELLANT;

AND

CHIMO SHIPPING LIMITED (*Plaintiff*) RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Shipping—Carriage—Contract—Damages—Verbal agreement to dismantle cargo of heavy machinery so that no single article would be in excess of 30 tons—Heavier pieces offered and accepted by ship's captain—Damage to ship's lifting tackle—Authority of captain to vary agreement—Remoteness of damages.

By a verbal contract of carriage, it was stipulated that no single piece of cargo tendered for carriage by the plaintiff's ship would exceed 30 tons—any piece in excess was to be reduced to that weight. The defendant's agent at the port of loading had not been advised of that stipulation. The ship's captain, when told that some pieces of equipment to be transported weighed in excess of the 30-ton limit, claimed that the ship's derrick would have no problem in handling those pieces of equipment. The ship's loading equipment was damaged. The trial judge maintained the action taken by the ship's owners. The defendant appealed to this Court.

Held: The appeal should be allowed.

The action of the master of the plaintiff's vessel appears to have been the effective cause of the damage for which the ship claimed. The master's lack of authority to alter the terms of the contract of carriage could not have the effect of transferring the responsibility for this action to the defendant. Even on the assumption that there was a breach of contract, it would not afford any ground for the recovery of the damage to the ship's loading equipment which was sought in this action.

Navigation—Transport—Contrat—Dommages—Entente verbale que toute machine pesante serait démontée de telle sorte qu'aucun article excéderait le poids de 30 tonnes—Articles excédant ce poids offerts et acceptés par le capitaine du navire—Dommages causés à l'appareil de levage du navire—Autorité du capitaine de changer les termes du contrat—Degré éloigné des dommages.

Par un contrat de transport fait oralement, il a été stipulé qu'aucune pièce de cargaison offerte pour être transportée sur le navire de la demanderesse excéderait le poids de 30 tonnes—toute pièce excédant ce poids devant être réduite à la limite. L'agent de la défenderesse au port d'embarcation n'a pas été avisé de cette stipulation. Le capitaine du navire, lorsqu'on lui présenta des articles à être transportés ayant un poids excédant la limite de 30 tonnes, affirma que la grue du navire n'aurait aucune difficulté à manipuler ces articles. L'appareil de levage du navire fut endommagé. Le juge au procès a maintenu l'action prise par les propriétaires du navire. La défenderesse en appela devant cette Cour.

---

*PRESENT: Taschereau C.J. and Fauteux, Abbott, Martland and Ritchie JJ.

Arrêt: L'appel doit être maintenu.

L'acte du capitaine du navire de la demanderesse semble avoir été la cause réelle du dommage réclamé par les propriétaires du navire. Le manque d'autorité de la part du capitaine pour varier les termes du contrat de transport ne peut pas avoir eu l'effet de transférer sur les épaules de la défenderesse la responsabilité pour cet acte du capitaine. Même en assumant qu'il y avait eu violation des termes du contrat, cela ne serait pas un motif pour que les dommages à l'appareil de levage du navire qui sont recherchés dans cette action puissent être recouvrés.

APPEL d'un jugement du Juge Dumoulin de la Cour de l'Échiquier du Canada dans une action pour dommages causés à un navire. Appel maintenu.

APPEAL from a judgment of Dumoulin J. of the Exchequer Court of Canada in an action for damages to a vessel. Appeal allowed.

L. Lalande, Q.C., for the defendant, appellant.

G. B. Knox, for the plaintiff, respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a decision of Mr. Justice Dumoulin of the Exchequer Court of Canada sitting as a judge in Admiralty by which he found the appellant responsible for damage to certain lifting tackle owned by the respondent and installed on the respondent's motor vessel *Sir John Crosby* when it was employed to lift the appellant's crane which was being loaded for shipment from Baie Verte, Newfoundland, to Montreal, Quebec, aboard the respondent's vessel on November 27, 1962.

No Bill of Lading covering the shipment was executed by the parties until after the vessel had returned to Montreal on December 2 and all arrangements between the parties for the carriage of these goods were made verbally in Montreal in telephone conversations between Samuel Stobo, the appellant's traffic manager, and Captain Jorgensson who was the respondent's marine superintendent.

The learned judge concluded that these telephone conversations constituted an agreement based "on the under-

1967

BROWN & ROOT LTD. v. CHIMO SHIPPING LTD.

Ritchie J.

standing that each shovel, crane or piece of machinery would be reduced in weight by the servants, preposes or agents of the defendant (appellant) so that the heaviest piece to be lifted by the said derrick and boom on the forecastle deck of the *Sir John Crosby* would not weigh in excess of 30 tons". This is the allegation contained in paragraph 4 of the respondent's Statement of Claim, and the trial judge's conclusion is based on the following evidence of Stobo and Jorgensson. In the course of his examination-for-discovery Stobo gave the following evidence:

Q. Would you still recollect...what the terms of the contract were?
A. Well, to the best of my knowledge—bearing in mind that three (3) years have passed...
Q. Yes?
A. Captain Jorgensson told me that the capacity of this *Sir John Crosby* was thirty (30) long tons; and that at that time we both agreed over the telephone that this approximated thirty-three (33) short tons—two-thousand-pound tons.
Q. When you speak of the capacity, you mean...
A. The lifting capacity of the gear of the vessel.
Q. Of the derrick or the gear?
A. Correct.

* * *

A. I said that I would pass this along, which I did, to Mr. Gordon Lindsay.
Q. To Mr. Gordon Lindsay in Montreal, your superior?
A. The project engineer; and he in turn said that he would notify the job site to try to meet this weight.

Captain Jorgensson gave the following account of the conversation:

Q. Did he (Stobo) give you this list by telephone or otherwise, by mail?
A. By telephone; and I took a note of it and I quoted him a price of carrying it and the conditions we would carry it on, which were to load at Baie Verte. They had to bring the cargo alongside the ship; and we would load it, carry it to Montreal and discharge it at Montreal.

And he was later asked:

Q. Now, was there any other condition of the contract in relation to any particular piece of machinery which had to be loaded in Baie Verte and taken to Montreal?
A. Yes, in the list given to us there was a crane; and it was agreed that this crane weighed over thirty (30) tons—thirty (30) long tons; and it would have to be reduced to the capacity of the ship's gear which was thirty (30) long tons.

It is to be noted that it was part of the agreement that the respondent would be responsible for loading the cargo at Baie Verte.

When the *Sir John Crosby* reached Baie Verte, Axel Anderson, the Captain, found that there was a 50-ton crane to be shipped for the account of the Dominion Structural Steel and a 45-ton crane to be shipped for the appellant's account. He said that there had been some conversations between himself and Captain Jorgensson before sailing from Montreal about these cranes being over the capacity of the ship's derrick and to the effect that they were to be stripped down so that no single piece should weigh more than 30 tons.

Mr. William Nye, the appellant's agent in Newfoundland, had not been notified by Mr. Gordon Lindsay that there was any necessity to reduce the weight of the crane before loading and he says that when he asked the ship's master, Captain Anderson, about the capacity of the ship's derrick he told him that there would be no problem about handling a piece of machinery weighing "a minimum of 42 tons" and that "he gave two indications of the capacity of the equipment on board the ship":

> One was that he said his gear had been tested to sixty-five (65) tons by the builders of the ship; and the second reference to the capacity of it was that he pointed out that they had off-loaded the pressure casting for Advocate Mines and that they had weighed—the casting had weighed ninety-seven thousand, five hundred (97,500) pounds. Those were the only two (2) references that he made to the capacity of the ship's gear.

It is apparent that the learned trial judge believed Nye's version of these conversations and rested his decision on the theory that the appellant's agent was bound by the terms of the undertaking made by telephone in Montreal not to offer cargo over 30 tons for hoisting with the ship's derrick. In this regard, the learned judge says:

> Captain Anderson's bragging about the feats of strength accomplished by his vessel's derrick savours of silliness, admittedly; but would, in all likelihood, have remained of no avail on a prudent employee, duly instructed by his principals to carry out a formal undertaking not to offer for hoisting any cargo in excess of 30 tons. Had this been done, then the justifiable presumption flows that Nye would attach greater importance to the directives imparted by his superior, Lindsay, than to Anderson's idle talk. His duty was not to Anderson but to Lindsay, had the latter only told Nye what was expected of him. It is, therefore, my humble opinion

1967

BROWN & ROOT LTD. v. CHIMO SHIPPING LTD.

Ritchie J.

that Lindsay's breach of contract was, essentially, the cause of this mishap, and the master's uncalled for statements a fortuitous consequence thereof.

Mr. Justice Dumoulin quotes at length from various text writers on the law of shipping to sustain the principle that "if the owners have themselves made a contract for the employment of their ship, the master cannot annul the contract and substitute another for it". The only case which the learned judge cites in support of this proposition is *Grant v. Norway*[1] and in my respectful opinion, this case is illustrative of the type of situation to which the text writers were referring.

In *Grant v. Norway*, a Bill of Lading had been signed by the master for 12 bales of silk, none of which had ever been shipped; it was held that transferees of the Bill of Lading, who had given value for it on the faith of the representation contained in it, had no claim against the ship owners because the master had no authority to give a Bill of Lading for goods which had not been shipped. In the course of his reasons for judgment, Jervis C. J. said:

> If, then, from the usage of trade and the general practice of shipmasters, it is generally known that the master derives no such authority from his position as master, the case must be considered as if the party taking the bill of lading had notice of express limitation of the authority, and in that case, undoubtedly, he could not claim to bind the owner by a bill of lading signed when the goods therein were never shipped.

While this line of cases and the commentaries made thereon by the various text writers may support the proposition that the master is not clothed with authority to alter the terms of a contract of carriage made between the owners and the shippers, they do not, in my opinion, afford any basis for contending that the owner is relieved of responsibility for damage which it has suffered through the misuse of its own equipment by the master who was employed, amongst other things, to supervise the use of that equipment.

In the present case the evidence appears to me to be uncontradicted to the effect that Captain Anderson knew or ought to have known that the weight of the appellant's crane when it was brought alongside the respondent's vessel for loading was likely to be in excess of the capacity of

[1] (1851), 20 L.J.C.P. 93.

the vessel's loading equipment. Instead of refusing to load the crane until it had been "reduced to the capacity of the ship's gear", Captain Anderson told the appellant's agent that "there would be no problem in handling it" as his gear had been tested to 65 tons and he proceeded to supervise the attachment of the ship's tackle to the heavy crane and gave the order for the use of the ship's derrick to lift it although he knew that this would be likely to put too great a strain on that equipment. This action of the master of the respondent's vessel appears to me to have been the effective cause of the damage for which the respondent now claims, and as I have indicated, I do not think that the master's lack of authority to alter the terms of the contract of carriage can have the effect of transferring the responsibility for this action from the respondent to the appellant.

In my view, the conversations which took place by telephone in Montreal between Stobo and Jorgensson constituted nothing more than an agreement to the effect that the appellant's crane would be accepted for loading at Baie Verte and shipped to Montreal on the respondent's vessel which carried loading equipment with a maximum hoisting capacity of 30 tons. This was communicated to Mr. Lindsay, the branch supervisor, but he did not consider it necessary to pass on the information concerning the capacity of the ship's lifting gear to his agent, Nye, at Baie Verte. I think that Mr. Lindsay was entitled to assume that the respondent's vessel would not accept any single piece of machinery for loading which had not been stripped to a weight of less than 30 tons and it does not seem to me to be at all unreasonable that he should have contemplated that the question of trimming the cargo to the capacity of the ship's loading gear was one which would be settled between his agent and the ship's master at the dockside, and that the master would know the capacity of his own equipment and would act accordingly.

I do not think that Mr. Lindsay's conduct constituted a breach of a basic condition of the contract, but assuming that Mr. Justice Dumoulin was correct in his finding in this regard, it nevertheless does not appear to me that such a breach would make the appellant liable for the damage to the ship's derrick which was occasioned by the fault of

1967

BROWN & ROOT LTD. v. CHIMO SHIPPING LTD.

Ritchie J.

the master. It has never been seriously questioned since the case of *Hadley v. Baxendale*[1] that damages for breach of contract are limited to the ordinary consequences which would follow in the usual course of things from such breach or for the consequences of the breach which might reasonably be supposed to have been in contemplation of both parties at the time they made the contract. Article 1074 of the *Civil Code* is to the same effect.

The ordinary consequences of the breach which was here alleged would have been the refusal of the vessel's master to put its lifting tackle on the appellant's crane until it was reduced in weight with the result that if the crane could not have been reduced it would either have been left at Baie Verte or put on board by the appellant's own means, as was in fact done. If the crane had been left at Baie Verte and no other cargo had been obtained to replace it, the measure of damages would have been the freight which the respondent could have earned by carrying the crane, but even on the assumption that there was a breach of contract, it would not afford any ground for the recovery of the damage to the respondent's crane which is sought in this action.

In view of all the above I would allow this appeal with costs.

Appeal allowed with costs.

Solicitors for the defendant, appellant: Lalande, Brière, Reeves & Paquette, Montreal.

Solicitors for the plaintiff, respondent: Beauregard, Brisset & Reycraft, Montreal.

[1] (1854), 9 Exch. 341, 156 E.R. 145.