Privy Council Appeal No. 15 *of* 1951

Canada Steamship Lines Limited - - - - - - - *Appellant*

v.

The King - - - - - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST JANUARY, 1952

Present at the Hearing:

LORD PORTER
LORD NORMAND
LORD MORTON OF HENRYTON
LORD ASQUITH OF BISHOPSTONE
LORD COHEN

[*Delivered by* LORD MORTON OF HENRYTON]

It will be convenient to refer to the appellant company as "the company" and to the respondent as "the Crown".

This is an appeal by special leave from six judgments of the Supreme Court of Canada dated the 23rd day of June, 1950, reversing in part a like number of judgments of the Exchequer Court of Canada (Angers, J.), which had maintained Petitions of Right against the Crown for damages arising out of a disastrous fire.

In the first of these six cases the company was suppliant, claiming from the Crown $40,713.72 as the value of the property of the company destroyed in the fire. In the remaining five cases the suppliants were owners of other property destroyed by the fire. The suppliants in these five cases and the amounts respectively claimed by them from the Crown were as follows:—

J. H. Heinz Company of Canada	$38,430.88
Canada & Dominion Sugar Co. Ltd. ...	$108,310.83
W. H. Taylor Limited	$3,670.25
Raymond Copping	$1,662.37
Cunningham & Wells Limited	$15,159.83

In addition to the present six cases, Petitions of Right were instituted against the Crown in some 250 other cases involving additional claims arising out of the fire to a total amount of $325,636.05, which Petitions of Right have remained in abeyance pending the outcome of these proceedings.

The events leading up to all these claims must now be set out. By an Indenture of Lease (hereafter called "the lease") dated the 18th November, 1940, the Crown leased to the company a piece of land on the western side of St. Gabriel Basin No. 1 of the Lachine Canal in

the City of Montreal " together with the right and privilege to occupy, use and enjoy, for the purpose of receiving and storing therein freight and goods loaded onto and/or unloaded from vessels owned and operated by the lessee," the whole of a shed known as St. Gabriel Shed No. 1 and hereafter referred to as " the shed ". The shed occupied the greater part of the said piece of land. The company was also granted " the right and privilege to construct, maintain and use, at its own cost and expense and over and/or across the said land, along the whole length of the southerly face of the said shed, a loading platform approximately fourteen feet in width, and a canopy extending approximately twenty feet beyond the southerly edge of the said platform." Between the land demised to the company and the St. Gabriel Basin No. 2 there lay a strip of land 30 feet in width. The term of the lease was 12 years from 1st May, 1940, and the rent was over $12,000 per annum. The lease was expressed to be " made and executed upon and subject to the covenants, provisoes, conditions and reservations hereinafter set forth and contained, and that the same and every of them, representing and expressing the exact intention of the parties, are to be strictly observed, performed and complied with namely :—". Then follow a number of clauses some of which must be set out, as the decision of this appeal ultimately turns upon the construction of clauses 7 and 17, and these two clauses must be considered in the light of the lease read as a whole. The more important clauses are as follows :—

" 1. That the Lessee will pay all rental herein reserved at the time and in the manner in these Presents set forth, without any abatement or deduction whatever.

. . . . . .

5. That the Lessor, His Servants or agents, shall at all times and for all purposes, have full and free access to any and every part of the said land, the said shed and the said platform.

6. That the said land shall be used for purposes in connection with the Lessee's business, only, and for no other purpose or purposes whatever.

7. That the Lessee shall not have any claim or demand against the Lessor for detriment, damage or injury of any nature to the said land, the said shed, the said platform and the said canopy, or to any motor or other vehicles, materials, supplies, goods, articles, effects or things at any time brought, placed, made or being upon the said land, the said platform or in the said shed.

8. That the Lessor will, at all times during the currency of this Lease, at His own cost and expense, maintain the said shed, exclusive of the said platform and the said canopy.

9. That the Lessee shall, in addition to the payment of the yearly rental hereunder, at i's own sole cost and expense, insure, concurrently with the execution of this Lease or as soon thereafter as possible, and thereafter keep insured during the currency of this Lease with an insurance company or companies satisfactory to the Minister of Transport the said shed against fire and other casualty in the sum of FORTY-EIGHT THOUSAND DOLLARS ($48,000.00)

. . . .

10. That the Lessee shall before constructing or erecting the said platform, the said canopy or other structures, including alterations to the said shed, on the said land, submit to the General Superintendent plans or drawings showing the location and design and nature of construction of the said platform, the said canopy or such structures, and obtain his approval of such plans or drawings, and shall construct or erect the said platform, the said canopy or such structures on the location and in accordance with the designs as shown on the plans and drawings approved by the General Superintendent, and thereafter maintain the said platform, the said

canopy or such structures in accordance with the designs respecting the same, and shall carry on the work of such construction and maintenance of the said platform, the said canopy and such structures at its own cost and expense and under the control and direction of the General Superintendent and to his entire satisfaction.

. . . . . .

12. That it is distinctly understood and agreed that this Lease is granted subject to the condition that the said platform and the said canopy shall forthwith, upon termination of this Lease in any manner, except as provided for in Clause 18 hereof, be and become vested in title in the Lessor without any payment of compensation to the Lessee in respect of the said platform and the said canopy.

. . . . . .

16. That the parcel or tract of land, thirty (30) feet in width, situated between St. Gabriel Basin No. 2 and the said land may be used by the Lessee in common with the public generally, it being understood and agreed, however, that the Lessee shall, in the discretion of the Superintending Engineer and in accordance with his direction, have preference in the use thereof.

17. That the Lessee shall at all times indemnify and save harmless the Lessor from and against all claims and demands, loss, costs, damages, actions, suits or other proceedings by whomsoever made, brought or prosecuted, in any manner based upon, occasioned by or attributable to the execution of these Presents, or any action taken or things done or maintained by virtue hereof, or the exercise in any manner of rights arising hereunder."

Pursuant to the lease the company took possession of the leased premises and continued to occupy them at all times material to the present litigation. A few days prior to 5th May, 1944, the Department of Transport in Montreal, representing the Crown, received a request from the company to effect certain minor repairs to the premises, including the doors of the shed. An inspection was made and the work undertaken by the employees of the Department of Transport almost immediately.

At this time the shed contained a large variety of merchandise awaiting shipment, other goods stored there by third parties and a quantity of equipment belonging to the company. A number of trucks and motor vehicles were on the wharf delivering or about to deliver further goods for transport.

The shed was constructed of corrugated iron on a steel frame and the shipping doors were hung on hinges bolted to the uprights of the frame. These uprights were in the form of steel "H-Beams", the flanges of which were one-quarter to three-eighths of an inch thick.

The Crown's employees, having almost completed their work on the afternoon of the 5th May, had removed and straightened the upper hinge of one of the shipping doors which had to be replaced. These hinges had originally been affixed to the "H-Beam" with three-eighths inch bolts. When they came to replace the hinge in question the Crown's employees found that they had no three-eighths inch bolts with them, the smallest size being one-half inch in diameter. They elected to enlarge the three-eighths inch hole in the "H-Beam" so that it would take the half-inch bolt.

Inside the door, immediately opposite and a few feet distant from the "H-Beam" in question were piled a number of bales of cotton waste.

Having decided to enlarge the hole, the Crown's employees proceeded to make use of an oxy-acetylene cutting torch for this purpose. The operation of this torch involved the use of oxygen and acetylene gas which are combined in a cutting-head under pressure and, when ignited, produce extremely high temperatures of from 5,500° to 6,300° Fahrenheit. The flame of the torch, at such temperatures, will cut through steel.

The use of such a torch in the vicinity of inflammable material is dangerous, since, apart from the heat of the torch itself, the operation of cutting the metal necessarily produces a shower of sparks or particles of molten metal which fly off at a tangent from the point of cutting. The Crown's employees directed the torch from the exterior into the interior of the shed. For the purpose of preventing sparks from entering the shed, they placed a board on the inside across the opening of the "H-Beam". This board was some three feet shorter than the beam and did not fit closely at the top because it was cut square whereas the roof of the shed sloped. There were accordingly openings at both the top and bottom of the beam through which sparks might escape. One of the workmen was stationed on the top of the bales of cotton waste and a pail of water was placed inside the shed.

The operation of enlarging the hole involved using the torch for about three or four minutes. Sparks escaped into the shed. The bales of cotton waste caught fire and the flames spread rapidly to the other contents of the shed and consumed the whole. Hence the claims, already mentioned, by the company and others against the Crown.

Angers, J., after hearing the evidence, found as a fact that the fire and resulting damage were caused by the gross negligence of the Crown's servants while acting within the scope of their duties or employment. The Crown had denied negligence, and had pleaded that the company's claim was in any event barred by the provisions of clause 7 of the lease. In Third Party proceedings the Crown relied upon clause 17 of the lease as giving rise to a right of indemnity from the company against the claims of the other five suppliants.

The learned trial judge did not express any view as to the meaning of clauses 7 and 17 of the lease. It was not necessary for him to do so because, basing himself on the law of Quebec which he reviewed exhaustively, he found that no clause would extend to relieve the Crown of liability for damages resulting from the gross negligence (*faute lourde*) of its servants. He accordingly refused to regard clause 7 as a bar to the company's action or to hold that clause 17 gave the Crown a right to indemnity in the other five cases. In the result he condemned the Crown to pay to the company and to the other five suppliants the damages respectively claimed by them, and he dismissed the Third Party proceedings brought by the Crown against the company. The amount of the damages was agreed and is not in issue.

The Supreme Court of Canada (Rinfret, C.J., and Rand, Kellock, Estey, Locke, Cartwright and Fauteux, JJ.) by a majority of six to one (Locke, J., dissenting) reversed the trial judge in the company's own case and unanimously reversed the trial judge in the cases of the other five suppliants in so far as the Third Party proceedings of the Crown against the company were concerned.

The Supreme Court concurred in the finding of the trial judge that the Crown's servants were negligent, but declined to hold that such negligence amounted to gross negligence (*faute lourde*). On the interpretation which they placed upon clauses 7 (Locke, J., dissenting) and 17 of the lease, they held that such clauses must be read as barring the company's action and as entitling the Crown to indemnity in the other actions. They accordingly dismissed the company's petition, confirmed the judgments maintaining the petitions in the five other cases, and condemned the company to indemnify the Crown in respect thereof.

In view of the findings of the Supreme Court, the Crown does not now seek to deny that its servants were negligent but contends that their negligence was not gross negligence. Thus the issues arising upon this appeal are whether the Supreme Court rightly construed clauses 7 and 17 of the lease, whether the Crown's servants were guilty of gross negligence and if so whether, by the law of Quebec, clauses stipulating immunity from or limitation of liability for the gross negligence of one of the contracting parties or his servants, or indemnity against such

liability, are illegal and void. Counsel for the company conceded that such clauses were legal and effective if they applied only to negligence which did not amount to *faute lourde*. He opened the appeal by submitting that even if the negligence of the Crown's servants did not amount to "*faute lourde*", on the true construction of clauses 7 and 17 of the lease clause 7 afforded no answer to the company's claim against the Crown, and clause 17 did not entitle the Crown to the indemnity claimed in the Third Party proceedings. As this submission, if successful, would dispose of the appeal, their Lordships thought it well to hear it argued fully before hearing argument upon the other issues in the case.

In considering this question of construction their Lordships have had in mind Articles 1013 to 1021 of the Civil Code of Lower Canada and also the special principles which are applicable to clauses which purport to exempt one party to a contract from liability. These principles were stated by Lord Greene, M.R., in *Alderslade* v. *Hendon Laundry Limited*, 1945, 1 K.B. 189 at page 192 as follows :—

> "Where the head of damage in respect of which limitation of liability is sought to be imposed by such a clause is one which rests on negligence and nothing else, the clause must be construed as extending to that head of damage, because if it were not so construed it would lack subject matter. Where, on the other hand, the head of damage may be based on some ground other than that of negligence the general principle is that the clause must be confined in it application to loss occurring through that other cause to the exclusion of loss arising through negligence. The reason is that if a contracting party wishes in such a case to limit his liability in respect of negligence, he must do so in clear terms in the absence of which the clause is construed as relating to a liability not based on negligence."

It appears to their Lordships that none of the learned Judges of the Supreme Court regarded this passage as being in any way in conflict with the law of Lower Canada, and Kellock, J., observed :—

> "It is well settled that a clause of this nature is not to be construed as extending to protect the person in whose favour it is made from the consequences of the negligence of his own servants unless there is express language to that effect or unless the clause can have no operation except as applied to such a case."

Their Lordships think that the duty of a court in approaching the consideration of such clauses may be summarised as follows:—

> (1) If the clause contains language which expressly exempts the person in whose favour it is made (hereafter called "the *proferens*") from the consequence of the negligence of his own servants, effect must be given to that provision. Any doubts which existed as to whether this was the law in the Province of Quebec were removed by the decision of the Supreme Court of Canada in *The Glengoil Steamship Company* v. *Pilkington*, 28 S.C.R. 146.
>
> (2) If there is no express reference to negligence, the Court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the *proferens*. If a doubt arises at this point, it must be resolved against the *proferens* in accordance with Article 1019 of the Civil Code of Lower Canada: "In cases of doubt, the contract is interpreted against him who has stipulated and in favour of him who has contracted the obligation."
>
> (3) If the words used are wide enough for the above purpose, the Court must then consider whether "the head of damage may be based on some ground other than that of negligence" to quote again Lord Greene in the *Alderslade* case. The "other ground" must not be so fanciful or remote that the *proferens* cannot be supposed to have desired protection against it; but subject to this qualification, which is no doubt to be implied from Lord Greene's words, the

existence of a possible head of damage other than that of negligence is fatal to the *proferens* even if the words used are *prima facie* wide enough to cover negligence on the part of his servants.

With these principles in mind, their Lordships turn to a consideration of clause 7, and they will first consider its language apart from the contents of clause 8 which immediately follows it. The claim of the company in the present case is "a claim . . . against the lessor for damage to . . . goods . . . being . . . in the said shed", and would therefore *prima facie* be barred by clause 7. It is, however, a claim for damage admittedly caused by the negligence of the Crown's servants. Their Lordships must therefore consider the third question stated above, and in considering this question it is necessary to bear in mind that the only liability of the Crown in the Province of Quebec in respect of claims arising *ex delicto* is based upon section 19 (*c*) of the Exchequer Court Act R.S.C. 1927 Chap. 34 as amended. That section is in the following terms:—

"The Exchequer Court shall have the exclusive jurisdiction to hear and determine the following matters:—

(*a*) . . . . .

(*b*) . . . . .

(*c*) Every claim against the Crown arising out of any death or injury to the person or property resulting from negligence of any officer or servant of the Crown while acting within the scope of his duties or employment."

Thus the field for claims against the Crown, not based upon negligence and coming within clause 7, is not a very wide one, but Counsel for the company has given the following instances of such claims:—

1. Claims under Article 1614 of the Civil Code for "defects or faults in the thing leased which prevent or diminish its use, whether known to the lessor or not".

There might be, says Counsel, a defect in the construction of the roof of the shed, not known to the Crown, and as a result of this defect the roof might fall down and injure chattels in the shed which belonged to the company. A claim for damage to these chattels resulting from this breach of the lessor's obligation under Article 1614 is not a claim based on negligence and it would be barred by clause 7.

2. Claims under Article 1612 (3) of the Civil Code.

Suppose, for example, says Counsel, that the Crown were to authorise a third party to carry out some operation on adjacent land which caused damage to the shed. In that event, again, the company would have a claim for damages, not based on negligence, which would be barred by clause 7.

3. Claims for a reduction of the rent, by the joint operation of Articles 1617 and 1660 of the Civil Code, if, for instance, a trespasser caused damage to the shed by setting part of it on fire, and the lessee's right of action for damages against the trespasser proved to be ineffectual.

Counsel for the Crown contended that a claim for a reduction of the rent would not fall within clause 7, but their Lordships think that such a claim, although it would not be a claim for "damages" might fairly be described as "a demand against the lessor for . . . damage . . . of any nature . . . to the said shed" within the meaning of clause 7.

It was contended on behalf of the Crown that these instances of possible claims for damages were fanciful and remote, and would not have been within the contemplation of the parties when the terms of the lease were agreed. No doubt there may be cases in which it may be difficult to draw the line. In the present case, however, their Lordships are not prepared to assume that the obligations imposed upon

lessors by the Civil Code were not in the minds of the parties. They think that the Crown may well have desired to protect itself from claims for damage arising out of any breach of these obligations, and yet may not have intended to go so far as to stipulate for protection from claims for damage resulting from the negligence of its servants.

So far, clause 7 has been considered apart from clause 8, but these two clauses must be read together, according to the ordinary principles of construction. So reading them, it appears to their Lordships most unlikely that clause 7 was intended to protect the Crown from claims for damage resulting from the negligence of its servants in carrying out the very obligations which were imposed upon the Crown by clause 8. It is difficult to imagine the Crown saying to the company, when the lease was being negotiated, "Notwithstanding that the Crown agrees to maintain the shed, at its own expense, throughout the term of the lease and notwithstanding that such an agreement implies an obligation to use due care in its performance, if the Crown's servants set about the work of repair in such a negligent manner that the shed and all the goods therein are destroyed, you are to have no claim for damages against the Crown" and if the Crown had made such a suggestion, it seems unlikely that the company would have accepted it.

Counsel for the Crown submitted that inconsistency between clauses 7 and 8 would be avoided if the former clause were read as barring claims for damages for non-feasance or misfeasance under clause 8, but leaving open to the company any claims for specific performance which it might make as a result of non-feasance, under Article 1641 (1) and (2) of the Civil Code. This is not an impossible construction of clause 7, but it appears to their Lordships to be a somewhat strained and artificial construction. Counsel for the Crown also relied on the fact that under clause 9 the company was bound to insure the shed, as an indication that the Crown did not intend to be liable for any damage to the shed, howsoever such damage might arise. This argument is not without force, as applied to the shed, but clause 9 makes no reference to goods within the shed.

Their Lordships will shortly consider how far the construction of clause 7 is affected by clause 17, for they entirely agree with the view expressed by the majority of the Supreme Court as to the close inter-relation of these two clauses. If, however, clause 7 were to be considered apart from clause 17, their Lordships would conclude that, even if the case is put at its highest in favour of the Crown, the Crown has failed to limit its liability in respect of negligence in clear terms. They would therefore decide against the Crown in accordance with the principles already stated.

Their Lordships now turn to clause 17, and observe at the outset that if the Crown's contention as to this clause is correct, it imposes a very remarkable and burdensome obligation on the company. However widespread may be the destruction caused by the negligence of the Crown's servants in carrying out the Crown's obligations under clause 8, the whole of the damage must be paid for by the company. In the present case the claims are heavy, and it is obvious that the damage caused by a fire such as this might be even greater. Such a liability for the negligence of others must surely be imposed by very clear words, if it is to be imposed at all.

The opening words of clause 17 are certainly very wide:

> "That the Lessee shall at all times indemnify and save harmless the Lessor from and against all claims and demands, loss, costs, damages, actions, suits or other proceedings by whomsoever made, brought or prosecuted."

They are, however, considerably narrowed in their scope by the words which follow. These words limit the application of the clause to claims, etc., "in any manner based upon, occasioned by or attributable to" any one of three specified matters, namely, (1) "The execution of these presents", (2) "Any action taken or things done or maintained by virtue hereof", (3) "The exercise in any manner of rights arising hereunder".

Are these words, in their ordinary meaning, wide enough to cover the negligent act of the Crown's servants, which caused the damage now under consideration?

The learned Chief Justice appears to have placed some reliance on the words " occasioned by or attributable to the execution of these Presents ", treating " execution " as synonymous with " performance ", but their Lordships are unable to take that view. They think that the words " execution of these Presents " refer only to the signing and sealing of the lease. This is the usual meaning of these words, and the word " executed " is used in the same sense at the end of the document, where it is stated that " The Lessee has executed these Presents ". Their Lordships think that by this phrase the Crown must have desired to protect itself against third parties claiming that they had contractual rights against the Crown which had been violated by the execution of the lease and the resulting grant of various rights to the company.

The remaining part of clause 17 gives rise to questions of great difficulty. Counsel for the Crown submitted that the negligent act of the Crown's servants was covered by the words " any action taken or things done . . . by virtue hereof ". They contended that the words " by virtue of " may fairly be construed as meaning " in consequence of " and that the act of the Crown's servants in enlarging the hole was done in consequence of the lease, none the less so because it was negligently done. They pointed out, quite rightly, that the intent of the clause was to protect the Crown against claims by third parties and submitted (*a*) that the only acts which could involve claims against the Crown by third parties would be acts of the Crown's servants, and therefore the words in question must refer to, or at least include, acts of the Crown's servants ; and (*b*) that the acts contemplated must be negligent acts, otherwise they would give rise to no liability to third parties.

Counsel for the company contended that this argument involved a strained and unnatural construction of the words in question and that the phrase " any action taken or things done by virtue hereof " would naturally refer to the doing of an act in pursuance of some right or privilege conferred by the lease rather than to the doing of an act in performance of some obligation imposed by the lease. They further contended that even if the words in question could cover an act properly done in performance of an obligation imposed by the lease, they could not extend to cover an act negligently done in the course of carrying out such an obligation. They submitted the following argument on the construction of clause 17. By the phrase " occasioned by or attributable to the execution of these Presents " the Crown was seeking to protect itself against the possible claims already mentioned, while by the rest of the clause the Crown was seeking to protect itself against possible liability to third parties occasioned by or attributable to acts of the company. The reference to the execution of the lease is closely linked up with the words which follow it. In executing the lease the Crown was conferring a large number of rights and privileges upon the company. The party who is likely to " take actions " or " do things " or " exercise rights " under the lease is the company. By clause 17 the Crown is saying, in effect to the company " Nothing that you do under the lease is to involve the Crown in any liability. Third Parties may consider that they have a claim against the Crown by reason of the Crown's act in granting to you the right of occupying the shed, or by reason of acts done by you with the sanction of the Crown such as the erection of the loading platform and canopy in accordance with plans approved by the Crown under clause 10 of the lease, or the exercise of " preferential " rights under clause 16. If any such claim is made against the Crown, and succeeds, you must indemnify the Crown ". In support of this argument counsel referred to the latter part of Article 1618 of the Civil Code as showing that the Crown might become a party to an action by a third party claiming some " right in or upon the thing leased ".

The choice between these two contentions is not an easy one, but their Lordships have come to the conclusion that the company's contention is to be preferred, for the following reasons. First, it gives the more natural construction to the words "any action done by virtue hereof". It is at least doubtful whether these words can be applied to a negligent act done in the course of carrying out an obligation. Secondly, even if the words are wide enough to include such a negligent act, the principle laid down in the *Alderslade* case must be applied and their Lordships are inclined to think that on the company's construction, "the head of damage may be based on some ground other than that of negligence", although the possible grounds are somewhat limited in extent. Thirdly, their Lordships think it is manifest that the meaning and effect of clause 17 are far from clear, and if this is so the Crown has failed to impose in clear terms the burdensome obligation which has already been described. There would have been no difficulty in inserting an express reference to negligence of the Crown's servants, in clauses 7 and 17, if these clauses had been intended to protect the Crown against the consequences of such negligence.

If their Lordships had agreed with the Supreme Court that clause 17 extended so far as to cover negligent acts of the Crown's servants, they might well have had to reconsider the provisional view already expressed as to clause 7, but as they have arrived at the contrary opinion, their provisional view as to clause 7, so far from being disturbed, is strengthened. It would seem unlikely that if negligent acts by the Crown's servants are outside the scope of one clause, they are within the scope of the other.

The result is that, after hearing an able argument as to the construction of the lease from both sides, their Lordships find that the Crown has failed to establish either its defence under clause 7 or its claim for indemnity under clause 17. This being so, no other question arises for decision on this appeal.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, the Orders of the Supreme Court in the petition of the company against the Crown and in the five Third Party proceedings should be set aside, and the Orders of Anger, J. restored. The Crown must pay the company's costs in each of these six petitions, here and in the Courts of Canada.

(14133) Wt. 8137—69 125 2/52 D.L./P1/3

In the Privy Council

CANADA STEAMSHIP LINES LIMITED

v.

THE KING

DELIVERED BY

LORD MORTON OF HENRYTON

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